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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 265

L. A. NIXON, PETITIONER,

vs.

JAMES CONDON AND C. H. KOLLE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 30, 1931

CERTIORARI GRANTED OCTOBER 19, 1931

(36,079)

(36,079)

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INDEX

	Original	Print
Proceedings in United States circuit court of appeals, fifth circuit	*a*	1
Caption (omitted in printing)	*a*	
Record from district court of the United States, Western Texas	1	1
Caption (omitted in printing)	1	
Plaintiff's petition	1	1
Citation issued to James Condon and C. H. Kolle and marshal's return thereon (omitted in printing)	11	
Defendant's first amended motion to dismiss	11	8
Order dismissing plaintiff's petition and exceptions of plaintiff thereto	14	10
Notice of appeal	14	10
Petition for appeal	15	11
Order allowing appeal	16	11
Assignment of errors	16	12
Appeal bond (omitted in printing)	20	
Præcipe for transcript of record	22	15
Opinion, Boynton, J.	23	15
Clerk's certificate (omitted in printing)	39	
Citation (" " ")	39	
Argument and submission (" " ")	40	
Opinion, Bryan, J.	41	28
Judgment	45	30
Clerk's certificate (omitted in printing)	46	
Order allowing certiorari	47	31

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 29, 1931

[fols. a-c] [Caption omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE WESTERN DIVISION OF TEXAS, EL PASO DIVISION

No. 1379. Law

L. A. NIXON, Plaintiff,

vs.

JAMES CONDON and C. H. KOYLE, Defendants

PLAINTIFF'S PETITION—Filed Mar. 15, 1929

To the Honorable Charles N. Boynton, Judge of said Court:

Comes now the plaintiff, L. A. Nixon, and for cause of action against the defendants, alleges:

[fol. 2] 1. That plaintiff is, and at all times mentioned in this complaint was, a citizen of the United States and of the State of Texas and a resident of the City and County of El Paso, in the State of Texas; and sues herein on an action which arises under the Constitution and laws of the United States, and is brought to redress and enforce his right as a citizen of the United States to vote in the State of Texas, and to redress the deprivation under the color of a law or statute of the State of Texas of rights and privileges secured to him by the Constitution, statutes and laws of the United States; to redress an injury which he sustained by reason of the acts of defendants in their official capacities discriminating against him by reason of his race and color, in violation of the Constitution, statutes and laws of the United States.

2. That on the 28th day of July, A. D. 1928, there was held in the State of Texas, and in the County of El Paso in said State, a primary election for the nomination of candidates for offices upon the Democratic ticket; that prior to said date the defendants James Condon and C. H.

Kolle were duly appointed as Judge and Associate Judge of election in and for Precinct No. 9, El Paso County, Texas, and qualified and acted as such at the Democratic primary election duly held in and for such precinct on July 28th, 1928. That the aforesaid primary election was held on said day for the purpose of selecting candidates for all precinct, county, district and State Officers of the State of Texas, and for representatives in the Congress of the United States, and for United States Senator, and that there were six candidates for United States Senator and two candidates for representative in Congress, one of whom was to be nominated or selected as the nominee of the Democratic party at said primary election.

[fol. 3] 3. That plaintiff is a negro as defined by the statutes of the State of Texas and belongs to the colored, or negro race, and upon said date, to-wit, July 28, 1928, was, and for more than a year prior thereto had been, a resident of said Precinct No. 9 in the City and County of El Paso, Texas; that he is a natural born citizen of the United States of America and of the State of Texas; that he was born in the State of Texas of parents who were citizens of the United States; that he is forty-five years of age, and subject to none of the disqualifications or disabilities provided by the Constitution of the State of Texas for an elector; that he has resided in the County of El Paso, State of Texas, for eighteen years last past, and that he duly paid his poll tax for the year 1927 in El Paso County, before the 31st day of January, 1928, and that he was duly registered as a qualified voter in said Precinct No. 9 in said County, and his name was duly certified by the Tax Collector of said County as a qualified voter and elector in and for said Precinct No. 9 five days prior to said Primary Election and was on said day and date a duly qualified voter and elector of Precinct No. 9, El Paso County, Texas.

4. That plaintiff is and on the 28th day of July, 1928, was a bona fide member of the Democratic party of the State of Texas, and in every other respect is and was entitled to participate in all elections held within the State of Texas, whether for the nomination of candidates for office or otherwise, and that he offered to take the pledge to support the nominees of the Democratic primary election held on said day as aforesaid and to comply in every respect with

the valid requirements of the laws of the State of Texas relating thereto, save as they violated the rights and privileges conferred upon and guaranteed to him by the Constitution and laws of the United States as aforesaid.

[fol. 4] 5. That on said 28th day of July, 1928, plaintiff presented himself at the polling place in said Precinct No. 9 and tendered his poll tax receipt for the year 1928 within the hours prescribed by law for the holding of said election, and requested of the defendants Condon and Kolle that he be supplied with a ballot and permitted to vote in said election, and that said defendants thereupon wrongfully and unlawfully refused to permit plaintiff to vote or to furnish him with a ballot; and stated as reason therefor that under the instructions given them by one H. O. Cregor, the Chairman of the County Democratic Executive Committee of El Paso County, Texas, pursuant to the resolution of the State Democratic Executive Committee of Texas, hereinafter set forth, adopted under the authority of Chapter 67 of the Laws of 1927 enacted by the Legislature of the State of Texas, hereinafter set forth, only white Democrats were allowed to participate in the Democratic primary election then in process.

6. That plaintiff is informed and believes and so alleges that the defendants Condon and Kolle refused the plaintiff his right to vote at said election by reason of the following resolution passed by the State Democratic Executive Committee of Texas, prior to July 28, 1928, to-wit:

"Resolved: That all white Democrats who are qualified and under the Constitution and laws of Texas and who subscribe to the statutory pledge provided in Article 3110, Revised Civil Statutes of Texas, and none other, be allowed to participate in the primary elections to be held July 28, 1928, and August 25, 1928, and further, that the Chairman and secretary of the State Democratic Executive Committee be directed to forward to each Democratic County Chairman in Texas a copy of this resolution for observance."

[fol. 5] 7. That the aforesaid resolution was adopted by the State Democratic Executive Committee of Texas under authority of the Act of the Legislature of the State of Texas, approved June 7, 1927, at First Called Session of the Fortieth Legislature, which is designated as Article

3107, and being Chapter 67 of Laws of 1927, and being in words and figures as follows:

"Authorizing Political Parties Through State Executive Committees to Prescribe Qualifications of Their Members

(H. B. No. 57)

Chapter 67

An Act to repeal Article 3107 of Chapter 13 of the Revised Civil Statutes of Texas, and substituting in its place a new article providing that every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party, and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Section 1. That Article 3107 of Chapter 13 of the Revised Civil Statutes of Texas be and the same is hereby repealed and a new article is hereby enacted so as to hereafter read as follows:

'Article 3107. Every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in [fol. 6] its own way determine who shall be qualified to vote or otherwise participate in such political party; provided that no person shall ever be denied the right to participate in a primary in this State because of former political views or affiliations or because of membership or nonmembership in organizations other than the political party.'

Sec. 2. The fact that the Supreme Court of the United States has recently held Article 3107 invalid, creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended and said rule is hereby suspended, and that this Act shall take effect and be in force from and after its passage, and it is so enacted.

Approved June 7, 1927.

Effective 90 days after adjournment."

8. That prior to the enactment by the Legislature of the State of Texas of Chapter 67 of the Laws of 1927, the Legislature of Texas, in the year 1923, passed Article 3093a of the Revised Civil Statutes of the State, which read as follows:

"Article 3093a. All qualified voters under the laws and constitution of the State of Texas who are bona fide [fide] members of the democratic party shall be eligible to participate in any democratic party primary election, provided such voter complies with all laws and rules governing party primary elections; however, in no event shall a negro be eligible to participate in a democratic party primary election held in the State of Texas, and should a negro vote in a democratic primary election, such ballot shall be void and election officials are herein directed to throw out such ballot and not count the same."

[fol. 7] That at the general primary election held in the County of El Paso, Texas, on July 26, 1924, plaintiff, who was then a bona fide Democrat with all the qualifications of a voter, applied to Judge and Associate Judge of elections in Precinct No. 9 of El Paso County, Texas, to supply him with a ballot and to permit him to vote, which they declined to do, solely on the ground that he was a negro, on the authority of the aforesaid Article 3093a; that thereupon the plaintiff brought an action against the aforesaid Judge and Associate Judge of elections to recover the damages sustained by him by reason of their wrongful refusal to permit him to vote, and thereafter such proceedings were had in said action that on March 7, 1927, the cause reported under the name and title of Nixon v. Herndon in 273 United States Reports at page 536, the said Article 3093a was declared unconstitutionall and void by the Supreme Court of the United States, in that it denied to the plaintiff the equal protection of the laws; that the decision of the Supreme Court of the United States is the same decision which is referred to in Section 2 of Chapter 67 of the Laws of 1927 of the State of Texas, and that said statute, which was approved on June 7, 1927, and pursuant to which the resolution of the State Democratic Executive Committee hereinbefore set forth was adopted, constituted an evasion of the determination of the Supreme Court of

the United States and of the provisions of the Fourteenth and Fifteenth Amendments to the Constitution of the United States, and was enacted and adopted for the purpose of denying to the plaintiff and all other negroes of the State of Texas who belong to the Democratic party the right to vote in Democratic party primaries held in said State.

[fol. 8] 9. That at the time of the passage of Chapter 67 of the Laws of 1927 aforesaid the Democratic [Democratic] party was the only one of the great political parties in the State of Texas which held primary election in that State, and, although couched in general terms, the aforesaid statute, when it referred to a State Executive Committee of Texas, and no other, the right to determine who should be qualified to vote or otherwise participate in Democratic primary elections held in said State, and was enacted by its Legislature for the purpose of preventing plaintiff and other negroes of the State who were members of the Democratic party from participating in Democratic primary elections.

10. That said Act of the Legislature and said resolution of the State Democratic Executive Committee, based thereon, are inoperative, null and void, in so far as they allowed only white Democrats who were qualified voters to participate in the Democratic party primary elections held in the State of Texas on July 28, 1928, and in effect prohibited this plaintiff, because he is a negro, from voting in said primary election; that the aforesaid resolution and the aforesaid Act of the Legislature pursuant to which said resolution was adopted and enforced, are violative of and contrary to the Constitution of the United States:

(a) Of the Fourteenth Amendment to said Constitution, which provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws," in that they denied to the plaintiff the equal protection of the Laws of Texas.

[fol. 9] (b) Of the Fifteenth Amendment to the said Constitution, which provides: "That the rights of citizens of

the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous conditions of servitude," in that the plaintiff's right to vote at the aforesaid primary election was denied and abridged by the aforesaid resolution and by the aforesaid Act of the Legislature of Texas, on account of his race and color.

(c) And are also contrary to the statutes enacted by the Congress of the United States, and especially to Section 31 of Title 8 of the United States Code (formerly Section 2004, of the United States Revised Statutes), which provides: "All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at such election, without distinction of race, color or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority to the contrary notwithstanding."

11. That there are many thousand negro Democratic voters in the State of Texas situated as is the plaintiff in this case; that the State of Texas is a State which is normally so overwhelmingly Democratic that a nomination on the Democratic ticket is equivalent to an election to the office for which such Democratic candidate is nominated, and that there is practically no contest for the selection of public officers within the State save that which takes place in Democratic primaries between candidates for nomination by the Democratic party.

[fol. 10] 12. That the aforesaid acts on the part of the defendants and each of them in denying plaintiff the right to vote at the Democratic primary election held on July 28, 1928, were wrongful, unlawful, and without constitutional warrant, and deprived him of a valuable political right to his damage in the sum of Five Thousand Dollars ($5,000.00).

Wherefore plaintiff prays that summons be issued directed to each and all of the defendants at their respective residences compelling them to answer this petition, and

upon hearing that plaintiff have judgment against the defendants and each of them jointly and severally for the sum of Five Thousand Dollars, together with costs of this suit, and for such other further relief as may be appropriate and just in the premises.

(Signed) Knollenberg & Cameron and Louis Marshall, Attorneys for Plaintiff.

[fol. 11] Citation issued to James Condon and C. H. Kolle and Marshal's return thereon omitted from the printed record.

* * * * * * *

IN UNITED STATES DISTRICT COURT

DEFENDANTS' FIRST AMENDED MOTION TO DISMISS—Filed May 18, 1929

Come now the defendants in the above styled and numbered cause and leave of the Court having been obtained to file this amended motion, move the Court to dismiss plaintiff's first original petition heretofore filed in this cause, and for grounds of dismissal set forth the following grounds, to-wit:

I

That the subject matter of this suit is political in its nature, and that this Court is without jurisdiction to determine the issues involved, or to award the relief prayed for.

II

That the plaintiff is not a proper party to maintain this suit.

III

That the matters and allegations in said petition are not sufficient to constitute a cause of action against these defendants or either of them.

[fol. 12] IV

That the Fourteenth and Fifteenth Amendments to the Constitution of the United States and Statutes enacted by

the Congress of the United States pursuant thereto do not appear to have been violated from the allegations in said petition.

V

That the primary election held on the 28th day of July, A. D. 1928, in the State of Texas and County of El Paso was not an election within the meaning of the Constitution of the United States, or any laws pursuant thereto, or the Fourteenth and Fifteenth Amendments to the Constitution of the United States, but that said petition shows that such primary election constituted merely a nomination for an election, and that no deprivation of any right to vote at an election is alleged in said petition.

VI

That said petition states no cause of action against defendants for damages for refusing a vote for the reason that the Acts of the Fortieth Legislature of the State of Texas, First Called Session, 1927, page 193, Chapter 67, paragraph 1, provides that the State Executive Committee of each political party shall have the right to prescribe the qualifications of its members, and that said State Executive Committee in prescribing such qualifications has excluded the plaintiff in this case.

VII

That the provisions of the above mentioned Act of Texas Legislature, all as fully set forth in plaintiff's petition, are in all respects valid and are not in conflict with the Consti- [fol. 13] tution of the United States or any amendments thereto, or in conflict with any of the Statutes of the United States enacted in pursuance of such Constitution or Amendments.

VIII

That the Constitution of the State of Texas and the laws of the State of Texas do not, from the allegations in this petition, appear to have been violated.

IX

That irrespective of any statutory authority the State Executive Committee of a political party has authority to

determine who shall comprise its membership, and *and* in this instance the State Executive Committee of the Democratic party of the State of Texas has excluded the plaintiff from membership in such political party, and that this exclusion did not violate any portion of the Constitution of United States, or of the Statutes amended by the Congress of the United States.

X

Defendants further deny that portion of plaintiff's petition which sets out that plaintiff was a Democrat, and hereby allege that plaintiff was not a Democrat at the time plaintiff's alleged cause of action arose.

(Signed) Ben R. Howell, Attorney for Defendants.

[fol. 14] In United States District Court

Order Dismissing Petition—Filed July 31, 1929

On this, the 31st day of July, A. D. 1929, after due hearing before the Court, it is ordered, adjudged and decreed by the Court that defendants' motion to dismiss, heretofore filed in this cause, be and the same is hereby sustained, and that this case be and the same is hereby dismissed at plaintiff's costs, to which order plaintiff, in open Court, excepted and gave notice of appeal.

(Signed) Charles A. Boynton, United States District Judge.

O. K. to form. Knollenberg & Cameron.
O. K. Ben R. Howell.

In United States District Court

Notice of Appeal—Filed Aug. 31, 1929

Notice of Appeal to the Above-named Defendants or Ben Howell, Their Attorneys of Record

You are hereby notified that the above named plaintiff, L. A. Nixon, feeling aggrieved by the judgment rendered in

the above styled and numbered cause by the District Court of United States in and for the Western District of Texas [fol. 15] on the 31st day of July, A. D. 1929, does hereby appeal from said judgment and all of said judgment, and this notice is hereby given you under and by virtue of the Act of Congress providing for appeals in such cases.

(Signed) Louis Marshall, Knollenberg & Cameron, Attorneys for Plaintiff.

Received copy of the above notice this 30th day of August, 1929. Service of same is hereby accepted and further notice and service of same is hereby waived.

(Signed) Ben R. Howell, Attorney for Defendants.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed Aug. 30, 1929

To the Honorable Charles A. Boynton, District Judge:

The above named plaintiff, L. A. Nixon, feeling aggrieved by the judgment rendered and entered in the above entitled cause on July 31, 1929, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Fifth Circuit for the reasons set forth in the assignment of errors filed herein and he prays that his appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and document upon which said decree is based duly authenticated be sent to the United States Circuit Court of Appeals for the Fifth Circuit, under the rules in such cases made and provided; that the appeal is taken from all of said judgment.

[fol. 16] And he further prays that the proper order relating to the required security to be required of him be made.

(Signed) Louis Marshall, (Signed) Knollenberg & Cameron, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

ORDER GRANTING APPEAL AND FIXING BOND—Filed August 30, 1929

On this 14th day of October, A. D. 1929, upon consideration of the above application, it is hereby ordered that the

appeal as prayed for be and the same is hereby allowed, and that a certified transcript of the record and all proceedings in said cause be forthwith transmitted to the United States Circuit Court in and for the Fifth Circuit. It is ordered that the Appeal Bond be fixed at the sum of $300.00.

(Signed) Charles A. Boynton, United States District Judge.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed Aug. 30, 1929

The United States District Court for the Western District of Texas erred in sustaining defendants' motion to dismiss and in dismissing said cause by its order and judgment of July 31, 1929, for the following reasons:

1. This case involves the construction and application of the Constitution of the United States and especially of the Fourteenth and Fifteenth Amendments thereto.

[fol. 17] 2. This is a case in which a law of the State of Texas and the administration and application of said law is claimed to be in contravention of the Constitution of the United States.

3. This is a suit for damages to redress the deprivation under color of law of a right and privilege secured by the laws of the United States, providing for equal rights of its citizens and of all persons within its jurisdiction.

4. This is a suit for damages for being deprived of the right to vote, solely on account of race and color and is based upon rights guaranteed by the constitution of the United States.

5. The plaintiff was denied the right to vote in the Democratic primary election on July 28, 1929, at El Paso, Texas, where there was a candidate for the office of Representative in the lower house of the United States Congress and for the office of United States Senator as well as the various State officers and this plaintiff was denied a right to vote solely upon the fact that he was a negro—he possessing all qualifications—and said plaintiff was denied this right because the legislature of the State of Texas

has passed a law with an emergency clause, fully set out in plaintiff's petition authorizing the State Democratic Executive Committee to prescribe qualifications for its members, and said Democratic Executive Committee had prescribed that a negro was not qualified to vote at a Democratic primary election, and such acts are in violation of the Constitution of the United States, which prohibits a citizen from being discriminated against in his right to vote because of his race and color.

[fol. 18] 6. The Court erred in holding that the act of the Texas Legislature approved June 7, 1927, at the first called session of the Fortieth Legislature, which is designated as Article 3107, being chapter 67 of the Laws of 1927 was not unconstitutional, and not in violation of the Fourteenth and Fifteenth Amendment of the Constitution of the United States, which is plead and set out in full in plaintiff's petition.

7. The Court erred in holding that the resolution passed by the Democratic Executive Committee of Texas prior to July 28, 1928, set forth in plaintiff's petition and is as follows:

"Resolved: That all white Democrats who are qualified and under the Constitution and laws of Texas and who subscribe to the statutory pledge provided in Article 3110, Revised Civil Statutes of Texas, and none other, be allowed to participate in the primary elections to be held July 28, 1928, and August 25, 1928, and further, that the Chairman and Secretary of the State Democratic Executive Committee be directed to forward to each Democratic County Chairman in Texas a copy of this resolution for observance."

was not a violation of the right to the plaintiff, a citizen of the United States, which denied him the right to vote in the Democratic primary of July 28, 1928, in El Paso County, Texas, but said resolution was a direct violation of the constitutional rights of plaintiff.

8. The Court erred in holding that the Democratic primary of July 28, 1928, was not an election within purview and meaning of the Fifteenth Amendment of the Constitution of the United States, and section 31, title 8, U. S. C. A.

[fol. 19] (R. S. U. S. 2004) for the reason that in the case of Nixon vs. Herndon, 273 U. S. 536, the Supreme Court of United States has held that such a primary is an election and that the denial of a citizen to vote in that election, constitutionally qualified was a denial of a legal right.

9. The Court erred in holding that the State of Texas, who has no right to discriminate against the citizen from voting in a Democratic primary in Texas as was held in Nixon vs. Herndon 273 U. S. 536 has the right to delegate that authority to the State Democratic Executive Committee of Texas, thus doing indirectly what they can not do directly.

10. The Court erred in holding that the members of the State Democratic Executive Committee and the judges and clerks of the primary election were not officials of the State of Texas and not acting as officials of the State of Texas when performing their duties as prescribed by the Statutes of Texas—and in making a distinction between the instant case and the case of James O. West vs. A. C. Bliley, et al. decided by the Honorable United States District Court of the Eastern District of Virginia—in the Virginia case, the election judges and clerks were paid by the state, and in this case they were paid by the various candidates—such a distinction would make all fee officers private citizens and not officials.

11. The Court erred in holding that a State Democratic Executive Committee has a right to discriminate against a citizen's right to vote at a primary election because of his color—such a discrimination is in violation of the Fourteenth and Fifteenth Amendment to the Constitution of the United States.

[fols. 20 & 21] 12. The Court erred in holding that the Democratic State Executive Committee and the judges and clerks of the primary election of July 28, 1929, were not acting by authority of the State, and thus as agents of the State—and thus discriminating against a citizen of the United States on account of his color.

13. The Court committed fundamental error in sustaining defendants' motion to dismiss plaintiff's case—for the reason that the petition stated a good cause of action at law.

Wherefore plaintiff-appellant prays that said errors be corrected and said cause be remanded for a new trial.

(Signed) Louis Marshall, Knollenberg & Cameron, Attorneys for Plaintiff.

Bond on appeal for $300.00, approved and filed October 22, 1929, omitted in printing.

[fol. 22] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Oct. 22, 1929

To D. H. Hart, clerk of said court:

Please take notice that the appellant (plaintiff) designates the following as portions of the record in this cause, which he hereby requests be incorporated in the transcript on this appeal:

[fol. 23] 1st. Citation in District Court.
2nd. Marshal's Return on Said Citation.
3rd. Plaintiff's Original Petition.
4th. Defendant's First Amended Motion to Dismiss.
5th. Judgment sustaining Plaintiff's Motion to Dismiss.
6th. Plaintiff's Assignment of Errors.
7th. Order Allowing Appeal and Fixing Bond.
8th. Notice of Appeal and Waiver thereon.
9th. Citation in Error and Waiver thereon.
10th. Appeal Bond.
11th. This Præcipe.

Yours respectfully, E. F. Cameron, Fred C. Knollenberg, Attorneys for Appellant.

IN UNITED STATES DISTRICT COURT

OPINION OF THE COURT—Filed July 31, 1929

Plaintiff brings suit herein, in its nature an action at law for recovery of damages, against defendants for their refusing, as Judges at a Democratic primary election, to

[fol. 24] permit plaintiff, a negro, to vote at such Democratic primary election in the State of Texas; alleging that plaintiff was by such action of defendants as Judges of such primary election deprived of rights to which plaintiff alleges he is entitled as a citizen of the United States under the Fourteenth and Fifteenth Amendments to the Constitution of the United States, and under and by virtue of statutes and laws of the United States, viz: Sec. 31, Title 8, U. S. C. A. (R. S. Sec. 2004), and Sec. 43, Title 8, U. S. C. A. (R. S. 1979), as warranting maintaining of this action, and jurisdiction of same as vested in the United States District Court under Secs. 11 (R. S., Sec. 629, par. 12, Mar. 3, 1911), 12 (R. S. Sec. 563, par. 11, Mar. 3, 1911, Sec. 629, par. 17, Mar. 3, 1911), and 14 (R. S. Sec. 563, par. 12; Sec. 629, par. 16, Mar. 3, 1911), Sec. 41, Title 28, U. S. C. A.

The petition alleges that plaintiff is a negro, a citizen of the United States and of the State of Texas, and a resident of El Paso, El Paso County, Texas, and in every way qualified to vote, as set forth in detail in his petition herein; that on July 28, 1928, a Democratic primary election was held at El Paso, and throughout the State of Texas, on said date for the nomination of candidates for a Senator and Representatives in Congress, and State and other officers upon the Democratic ticket; that the plaintiff being a member of the Democratic party sought to vote and presented himself at time and place specified and asked for a ballot and requested the privilege to vote at such primary election, but was refused a ballot and denied by defendants the right to vote at such primary election, defendants acting as election judges at holding of such Democratic primary election, held in the election precinct of which plaintiff was a resident in the City of El Paso, El Paso County, Texas; that such denial by defendants to permit plaintiff to vote [fol. 25] at such Democratic primary election was based on and in accordance with instructions of the Chairman of the Democratic County Executive Committee of El Paso County, Texas, in turn based on and in accordance with resolution passed by the State Democratic Executive Committee of Texas, prior to July 28, 1928, to-wit:

"Resolved: That all white Democrats who are qualified, and under the Constitution and laws of Texas and who subscribe to the statutory pledge provided in Article 3110, Revised Civil Statutes of Texas, and none other, be allowed

to participate in the primary elections to be held July 28, 1928, and August 25, 1928, and further, that the Chairman and secretary of the State Democratic Executive Committee be directed to forward to each Democratic County Chairman in Texas a copy of this resolution for observance."

plaintiff alleging the aforesaid resolution was adopted by the State Democratic Executive Committee of Texas under authority of an Act of the Legislature of the State of Texas, approved June 7, 1927, at First Called Session of the Fortieth Legislature, which is designated as Article 3107, and being Chapter 67 of Laws of 1927, and being as follows:

"Article 3107. Every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party; provided that no person shall ever be denied the right to participate in a primary in this State because of former political views or affiliations or because of membership or non-membership in organizations other than the political party."

[fol. 26] and plaintiff further alleging that such Act of the Legislature of the State of Texas, aforesaid, and resolution of the State Executive Committee of Texas, aforesaid, instructions of the Chairman of the Democratic County Executive Committee of El Paso County, Texas, and action of defendants as election judges at such Democratic primary election, are contrary to and in violation of the Fourteenth and Fifteenth Amendments to the Constitution of the United States and statutes and laws of the United States hereinbefore recited; and plaintiff brings this action herein for the recovery of damages to redress an injury which he alleges he sustained by reason of the acts of defendants in their official capacities, as election judges at such Democratic primary election, discriminating against him by reason of his race and color, in violation of the Constitution, statutes and laws of the United States.

Defendants have filed, and present to the Court, motion to dismiss, urging as grounds for dismissal, together with

other grounds deemed immaterial, and unnecessary to be considered and passed upon by the Court, the following: That the matters and allegations in plaintiff's petition are not sufficient to constitute a cause of action against defendants or either of them; that the Fourteenth and Fifteenth Amendments to the Constitution of the United States, and Statutes enacted by the Congress of the United States pursuant thereto, do not appear to have been violated from the allegations in said petition; that the primary election held on the 28th day of July, A. D. 1928, in the State of Texas, and County of El Paso was not an election within the meaning of the Constitution of the United States, or any laws pursuant thereto, or the Fourteenth and Fifteenth Amendments to the Constitution of the United States, but that plaintiff's petition shows that such primary election con- [fol. 27] stituted merely a nomination for an election, and that no deprivation of any right to vote at an election is alleged in said petition; that the provisions of the Act of the Texas Legislature, as fully set forth in plaintiff's petition, are in all respects valid and not in conflict with the Constitution of the United States or any amendment thereto, or in conflict with any of the Statutes of the United States enacted in pursuance of such Constitution or amendments; that the Constitution of the State of Texas and laws of the State of Texas do not, from the allegations in plaintiff's petition contained, appear to have been violated; that irrespective of any statutory authority the State Executive Committee of a political party has authority to determine who shall comprise its membership, and in this instance the State Executive Committee of the Democratic party of the State of Texas has excluded the plaintiff from membership in such political party, and that this exclusion did not violate any portion of the Constitution of the United States, or of the statutes enacted by the Congress of the United States.

By the Thirteenth Amendment to the Constitution slavery and involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, was abolished, prohibited to exist within the United States, or any place subject to their jurisdiction; and Congress vested with power to enforce the provisions of such Amendment by appropriate legislation.

The Fourteenth Amendment provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[fol. 28] The Fourteenth Amendment by effect of wording thereof thus including and declaring as citizens of the United States all members of the negro race, including those who prior to such Amendment have been held in slavery in various States of the Union.

The Fifteenth Amendment, which in express terms alone relates to the subject of suffrage, the right to vote, provides as follows: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." and further that Congress shall have power to enforce said Amendment by appropriate legislation.

Thus by the Thirteenth Amendment slavery was abolished; by effect of the Fourteenth Amendment negroes, were made, included and declared citizens of the United States and of the States wherein they reside; and by the Fifteenth Amendment it was provided that the right of citizens of the United States, all citizens, to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude; and Congress given power to enforce the provisions of said Amendments by appropriate legislation. These three Amendments being known and designated as the "Civil War Amendments," were passed and ratified in the years 1865, 1868, and 1870, respectively, and though applying to all citizens alike passage and adoption of same was prompted and deemed necessary for protection of the civil and political rights of those of the African race and their descendants, negroes, who had just been freed from slavery. Those sections of the Statutes of the United States, viz: Sec. 31, Title 8, U. S. C. A., and Sec.

43, Title 8, U. S. C. A., relied upon by plaintiff as authorizing maintaining of his action herein, were passed by Congress on May 31, 1870, and April 20, 1871, respectively.

The Fourteenth and Fifteenth Amendments are each expressly and exclusively directed against action by any [fol. 29] State, prohibits and restrains any State from enacting any law, or action by any State, or action under color of law of such State, depriving any citizen of the United States of any civil right guaranteed by the Fourteenth Amendment, and a political right, the right to vote, exercise of the elective franchise, guaranteed by the Fifteenth Amendment, respectively; as held by an unbroken like of decisions of the Supreme Court of the United States. It is also held by said decisions that there is no violation of either the Fourteenth or Fifteenth Amendments to the Constitution of the United States, unless the wrong complained of be based on some action by a State of the United States, by enactment as a governmental body, as a legislative body, of a law, or action by some official or governmental agency acting for the State in the name of the State, or under color of law, in distinction from that of private individuals. That if the wrong complained of be not that of the State or of some official or governmental agency acting for and in name of the State, but be the action of some private individual or individuals, no action lies that can be maintained under said Amendments, respectively, and statutes of the United States above cited. Slaughterhouse Cases, 16 Wall. 36; 83 U. S. 36; United States vs. Reese, et al., 92 U. S. 214, 218; United States vs. Cruikshank, et al., 92 U. S. 542; Strauder vs. West Virginia, 100 U. S. 303; Virginia vs. Rives, 100 U. S. 318; Ex Parte Virginia, 100 U. S. 339; Ex Parte Seibold, 100 U. S. 371; Neil vs. Delaware, 103 U. S. 370; United States vs. Harris, 106 U. S. 629, 641; Civil Rights Cases, 109 U. S. 3; Ex Parte Yarbrough, 110 U. S. 651, 664; Yick Wo vs. Hopkins, 118 U. S. 356, 365, 370, 373; In re Kemmler, 136 U. S. 436, 438, 448; McPherson vs. Blacker, 146 U. S. 1, 23-25; Gibson vs. Mississippi, 162 U. S. 565, 579; Carter vs. Texas, 177 U. S. 442; Wiley vs. Sinkler, 179 [fol. 30] U. S. 58; 65; Swafford vs. Templeton, 185 U. S. 487, 491; Giles vs. Harris, 189 U. S. 475, 485; James vs.

Bowman, 190 U. S. 127, 136; Hodges vs. United States, 203 U. S. 1, 15, 19; Guinn vs. United States, 238 U. S. 347, 354; Meyers vs. Anderson, 238 U. S. 369; United States vs. Mosley, 238 U. S. 383; Buchanan vs. Warley, 245 U. S. 60; Love, et al., vs. Griffith, et al., 266 U. S. 33; Corrigan vs. Buckley, 271 U. S. 323, 330; Nixon vs. Herndon, 273 U. S. 536, 540; Grigsby vs. Harris (D. C., S. D. Tex.), 27 F. (2d) 942.

Plaintiff's petition alleges that in 1923 the Legislature of Texas passed an Act, Art. 3093a, which read as follows:

"Article 3093a. All qualified voters under the laws and constitution of the State of Texas who are bona fide members of the democratice party shall be eligible to participate in any democratic party primary election, provided such voter complies with all laws and rules governing party primary elections; however, in no event shall a negro be eligible to participate in a democratic party primary election held in the State of Texas, and should a negro vote in a democratic primary election, such ballot shall be void and election officials are herein directed to throw out such ballot and not count the same."

And that the Supreme Court of the United States in case of Nixon vs. Herndon, opinion by Justice Holmes (March 7, 1927), 273 U. S. 536, 539-541, held said act unconstitutional, as an act, a law, enacted by the legislature of Texas, that in its language, and express provisions, was in direct violation, as held by the Court, of the Fourteenth Amendment to the Constitution of the United States; in that such act was clearly an enactment by the State Legislature of the State of Texas of a law depriving a citizen of the [fol. 31] United States, because of race or color, of a civil right or rights guaranteed him by the Fourteenth Amendment, as a citizen of the United States, and therefore plaintiff in said case was entitled to maintain his action therein, one for recovery of damages, because same was based upon action taken by defendants, in denying plaintiff the right to vote at a Democratic primary election, under and by virtue of unconstitutional and void act or law enacted by a State, the State of Texas, viz: the enactment of said Art. 3093a, aforesaid, so held to be unconstitutional by the Supreme Court of the United States in said case of Nixon

vs. Herndon, supra; the Supreme Court citing as in support of its opinion in said case Wiley vs. Sinkler, supra, and Giles vs. Harris, supra. Plaintiff further alleges in his petition, herein, that following such decision of the Supreme Court of the United States in Nixon vs. Herndon, supra, the Legislature of Texas by the Act approved June 7, 1927, specially repealed said Art. 3093a and enacted Art. 3107, being Chapter 67 of the laws of Texas of 1927, in this opinion hereinbefore recited, and contends that said Act, Art. 3107, is unconstitutional in that it is sought and intended thereby to delegate to the State Executive Committees of political parties in Texas power to exclude colored persons, negroes, from voting at primary elections.

Without undertaking to quote from decisions of the Supreme Court of the United States above cited, holding that action cannot be maintained unless it be based upon some action of a State held to be in violation of the Fourteenth or Fifteenth Amendments, it here appears to the Court, and the Court so finds and holds, that said Act of the Legislature of the State of Texas approved June 7, 1927, Art. 3107 of the Revised Statutes of the State of Texas, here in question, is not unconstitutional, the enactment by the State of Texas of a law in violation of either the Four- [fol. 32] teenth or Fifteenth Amendments to the Constitution of the United States. The wrong here complained of, alleged as basis of Plaintiff's action, consists of and arises from the resolution passed by the State Democratic Executive Committee, prior to July 28, 1928, in this opinion above quoted, and instructions to Democratic County Chairman in Texas as in said resolution recited, and action of defendants as judges at a primary election, in denying and refusing to permit plaintiff to vote at such Democratic primary election held July 28, 1928, as in plaintiff's petition alleged. The language of the act of the Legislature here complained of, Art. 3107, shows that in itself there is no vice, as in Art. 3093a held to be unconstitutional in the case of Nixon vs Herndon, supra; as said Art. 3107 provides no action by a State, and directed no action be taken upon the part of any person or individuals that is prohibited by either the Fourteenth or Fifteenth Amendments, under decisions of the Supreme Court of the United States above cited. Said action by the State Democratic Executive Committee, by passage of the resolution above cited, here in

question, and by defendants in denying and refusing to permit plaintiff to vote at such Democratic primary election, is not shown to be the act of the State of Texas, but to be that taken by private individuals; and it is therefore held plaintiff is not warranted to maintain action as in his petition alleged, and this Court is without jurisdiction over same, the wrong complained of in plaintiff's petition, unless it can be held that defendants in refusing to permit plaintiff to vote at such primary election, were acting as officials or governmental agencies of the State of Texas, in name of the State.

In each of the cases, Nixon vs. Herndon, 273 U. S. 536; the Child Labor Tax case, 259 U. S. 20; Standard Scales Company vs. Farrell, 249 U. S. 577; Hammer vs. Hodenhart, 247 U. S. 251; Home Telephone & Telegraph Company [fol. 33] vs. Los Angeles, 227 U. S. 278; Yick Wo vs. Hopkins, 118 U. S. 356; and Williams vs. Bruffey, 96 U. S. 176, and other cases cited and relied upon by plaintiff herein, examination of the facts disclose that the action complained of was based upon some law enacted by the legislative department of a State, by municipal corporation, some commission or body corporate, or some person or individual, as an official of the State acting in their official capacity, each being State officers, legally holding official position under the State, or some body corporate of the State as a governmental body, acting as such in the name of the State, and not as private individuals.

The Court here holds that the State Democratic Executive Committee of the State of Texas, at time of the passage of the resolution here complained of, was not a body corporate to which the Legislature of the State of Texas could delegate authority to legislate, and that the members of said Committee were not officials of the State of Texas, holding position as officers of the State of Texas, under oath, or drawing compensation from the State, and not acting as a State governmental agency, within the meaning of the law, but only as private individuals holding such position as members of said State Executive Committee by virtue of action taken upon the part of members of their respective political party; and this is also true as to defendants, they acting only as representatives of such political party, viz: the Democratic party, in connection with the holding of a Democratic primary election for the nomina-

tion of candidates on the ticket of the Democratic party to be voted on at the general election, and in refusing to permit plaintiff to vote at such Democratic primary election defendants were not acting for the State of Texas, or as a governmental agency of said State.

[fol. 34] The expenses of holding primary elections in the State of Texas, under the laws of Texas undertaking in certain particulars to regulate primary elections, are not paid by the State of Texas, but by the primary election law of Texas, Art. 3108 R. S. of Texas, it is provided that such expenses of holding primary elections shall be paid by the respective candidates offering themselves for selection as nominees or candidates of their respective political organizations, to be voted on for election by the people, electors, of the State as a whole at a general election. In the States of Illinois, Virginia, and perhaps other States in which laws exist governing the holding of primary elections, the expenses of the holding and conducting of such primary elections in said States are paid out of the funds of the State, which is not the case in Texas, as above noted. It has been held in Illinois, as shown by decisions of the Supreme Court of said State cited by plaintiff's counsel, that the judges and clerks holding and conducting primary election in Illinois, in which an official ballot is used, and members of all political parties are privileged to vote in such primary, for nomination of the candidates to be selected as nominees of their respective parties; the expenses of holding such primary election are paid out of State funds, and the judges and clerks of such primary election of said State draw compensation, and are held to be officials of the State. This appears also to be the case in Virginia, that is to say the holding of a primary election is paid for by State funds, and held to be a governmental agency, and persons conducting such elections, judges, clerks, etc. held to be officials of the State, they drawing compensation from the State for services rendered, and acting in the name of the State, as recited in recent opinion of United States District Judge D. Lawrence Groner, of the Eastern District of Virginia, ren-

[fol. 35] dered in the case of James O. West vs. A. C. Bliley, et al., and apparently made the basis of such opinion, which opinion has not yet been published in the official reports, in which the Court overruled demurrer to plaintiff's declaration holding that action of defendants in said case in ex-

cluding the plaintiff, a negro, from voting at a Democratic primary election was an infringement of rights guaranteed to him by the Fourteenth and Fifteenth Amendments to the Constitution of the United States, and showed cause of action maintainable in the United States Court under Sec. 43, Title 8, U. S. C. A. (R. S. 1979).

The Supreme Court of the United States said in case of Virginia vs. Rives, supra; "The provisions of the Fourteenth Amendment of the Constitution we have quoted all have reference to State action exclusively, and not to any action of private individuals." Again in Ex Parte Virginia, supra, "They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws." Such statement of the law by the Supreme Court is quoted with approval in James vs. Bowen, supra, and many other decisions of the Supreme Court previously cited in this opinion.

It is here held by the Court that by no line of justified reasoning, based on the facts in plaintiff's petition alleged, and provisions of the primary election laws of Texas, can it be held as a matter of law that the members of the State Democratic Executive Committee, or of any other political party in Texas, or defendants herein acting as election [fol. 36] judges at the primary election in question, were officers of the State of Texas, were such at time of acting as such primary election judges, and acting as officials or agents of the State of Texas, or as a governmental agency of said State, in so refusing to allow plaintiff to vote at such primary election. The Court also holds that the members of a voluntary association, such as a political organization, members of the Democratic party in Texas, possess inherent power to prescribe qualifications regulating membership of such organization, or political party. That this is, and was, true without reference to the passage by the Legislature of the State of Texas of said Art. 3107, and is not affected by the passage of said act, and such inherent power remains and exists just as if said act had never been passed.

The Court further holds that a primary election under the laws of the State of Texas is not an "election" within the purview and meaning of the Fifteenth Amendment to the Constitution of the United States, and Sec. 31 of Title 8, U. S. C. A. (R. S. U. S. 2004). Newberry vs. United States, 256 U. S. 232, 250; Koy vs. Schneider, 110 Texas 369, 376, 377; Waples vs. Marrast, 108 Tex. 5, 11; Ashford vs. Goodwin, 103 Tex. 491; Hammond vs. Ash, 103 Tex. 503, and Cunningham vs. McDermett, (C. C. A. of Texas, 1925) 277 S. W. 218. In case of Waples vs. Marrast, supra, the Supreme Court of Texas, opinion by Chief Justice Phillips, in discussing the primary election laws, says, in part:

"A political party is nothing more or less than a body of men associated for the purpose of furnishing and maintaining the prevalence of certain political principles or beliefs in the public policies of the government. As rivals for popular favor they strive at the general election for the con- [fol. 37] trol of the agencies of the government as the means of providing a course for the government in accord with their political principles and administration of those agencies by their own adherents. * * * But the fact remains that the objects of political organizations are intimate to those who compose them. They do not concern the general public. * * * They perform no governmental function. They constitute no governmental agency. The purpose of their primary elections is merely to enable them to furnish their nominees as candidates for the popular suffrage. * * * To provide nominees of political parties for the people to vote upon in the general elections is not the business of the State. * * * Political parties are political instrumentalities. They are in no sense governmental instrumentalities.

At the time of the adoption of the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States and enactment by Congress of Sec. 31, Title 8, U. S. C. A. (R. S. Sec. 2004), and Sec. 43, Title 8, U. S. C. A. (R. S. 1979), and other acts of Congress to protect the rights guaranteed to citizens under said Amendments to the Constitution, primaries, primary elections, were then unknown.

The Supreme Court of the United States in case of Newberry vs. United States, supra, in discussing Sec. 4, Art. 1, of the Constitution of the United States, and the Seven-

teenth Amendment, which directs that Senators be chosen by the people, says:

"Undoubtedly elections within the original intendment of Sec. 4 were those wherein Senators should be chosen by Legislatures and Representatives by voters possessing 'the qualifications requisite for electors of the most numerous branch of the State Legislature.' Art. 1, Secs. 2 and 3. [fol. 38] The Seventeenth Amendment, which directs that Senators be chosen by the people, neither announced nor requires a new meaning of election and the word now has the same general significance as it did when the Constitution came into existence—final choice of an officer by the duly qualified electors. Hawke vs. Smith, 253 U. S. 221. Primaries were then unknown. Moreover, they are in no sense elections for an office, but merely methods by which party adherents agree upon candidates whom they intend to offer and support for ultimate choice by all qualified electors. General provisions touching elections in constitutions or statutes are not necessarily applicable to primaries —the two things are radically different. And this view has been declared by many state Courts. People v. Cavanaugh, 112 California, 674; State v. Erickson, 119 Minnesota, 152; State v. Taylor, 220 Missouri, 618; State v. Woodruff, 68 N. J. L. 89; Commonwealth v. Wells, 110 Pa. St. 463; Ledgerwood v. Pitts, 122 Tennessee, 570."

Hence, holding plaintiff's petition fails to show he has been deprived of any right guaranteed him under the Constitution, Statutes and laws of the United States, or facts showing cause of action of which the United States Court has jurisdiction, defendants' motion to dismiss is hereby sustained, and the case dismissed at plaintiff's costs.

(Signed) Charles A. Boynton, United States District Judge.

[fol. 39] Clerk's certificate to foregoing transcript omitted in printing.

Original Citation omitted from the printed record, the original thereof being on file in the office of the Clerk of the United States Circuit Court of Appeals.

* * * * * * *

[fol. 40] Minute entry of argument and submission, November 10, 1930, omitted in printing.

[fol. 41] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 5758

L. A. NIXON, Appellant,

versus

JAMES CONDON and C. H. KOLLE, Appellees

Appeal from the District Court of the United States for the Western District of Texas

Arthur B. Spingarn, Fred C. Kollenberg, E. F. Cameron for Appellant.

Ben R. Howell (Thornton Hardie on the brief) for Appellees.

Before Bryan and Foster, Circuit Judges, and Dawkins, District Judge

OPINION FILED—May 16, 1931

BRYAN, Circuit Judge:

Appellant sued the judges of election for the precinct in which he was registered to recover damages for their refusal to permit him to vote at the primary election held in Texas in 1928 for the nomination of candidates of the Democratic party. He alleged in his petition that he was [fol. 42] a citizen of the United States and of Texas, a member of the Democratic party, and in every way qualified to vote; that he is a negro, and solely because of his race and color he was denied the right to vote by appellees, who as precinct judges of election based their denial of such right upon a resolution, adopted by the State Democratic Executive Committee of Texas which provided "that all white Democrats * * *, and none other, be allowed to participate in the primary elections to be held," etc.; that this resolution was void and of no effect because Chap-

ter 67 of the laws of 1927 enacted by the Legislature of Texas, pursuant to which it was passed, violates the Fourteenth and Fifteenth Amendments to the Constitution of the United States.

The action was dismissed by the district court on motion of Appellees. 34 F. (2) 463. A similar action brought by the same appellant against the precinct judges of election because of their refusal to permit him to vote in the primary election of 1924 held in Texas to nominate candidates of the Democratic party was sustained by the Supreme Court. Nixon v. Herndon, 273 U. S. 536. A statute of Texas enacted in 1923, which later became known as Article 3093a, and which provided that "in no event shall a negro be allowed to participate in a Democratic primary held in the State of Texas," was held in that case to violate the equal protection clause of the Fourteenth Amendment; and it therefore was found unnecessary to consider the Fifteenth Amendment. The Legislature of Texas in 1927 repealed the Act of 1923 which the Supreme Court had shortly theretofore declared unconstitutional in Nixon v. Herndon, supra, and enacted in its place Chapter 67 which provides "Every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in [fol. 43] its own way determine who shall be qualified to vote or otherwise participate in such political party"; etc.

It is of course to be conceded since the decision in Nixon v. Herndon, supra, that the right of a qualified citizen to vote extends to primary elections as well as to general elections. The distinction between appellant's cases, the one under the 1923 statute and the other under the 1927 statute, is that he was denied permission to vote in the former by State statute, and in the latter by resolution of the State Democratic Executive Committee. It is argued on behalf of appellant that this is a distinction without a difference, and that the State through its legislature attempted by the 1927 act to do indirectly what the Supreme Court had held it was powerless to accomplish directly by the 1923 act. We are of opinion, however, that there is a vast difference between the two statutes. The Fourteenth Amendment is expressly directed against prohibitions and restraints imposed by the States, and the Fifteenth protects the right to vote against denial or abridgment by any

State or by the United States; neither operates against private individuals or voluntary associations. United States v. Cruikshank, 92 U. S. 542; Virginia v. Rives, 100 U. S. 313; James v. Bowman, 190 U. S. 127. A political party is a voluntary association, and as such has the inherent power to prescribe the qualifications of its members. The act of 1927 was not needed to confer such power; it merely recognized a power that already existed. Waples v. Marrast, 108 Tex. 5; White v. Lubbock, 30 (Tex.) S. W. 722; Grigsby v. Harris, 27 F. (2) 942. It did not attempt as did the 1923 act to exclude any voter from membership in any political party. Precinct judges of election are appointed by party executive committees and are paid for [fol. 44] their services out of funds that are raised by assessments upon candidates. Revised Civil Statutes of Texas, §§ 3104, 3108.

Each political party is represented by its own election officials who have nothing to do with conducting the primary of any other party. In these particulars the primary election law of Texas differs radically from that of Virginia, where the State conducts and pays the expenses of holding the primary for all political parties just as it does in the general election. West v. Bliley, 33 F. (2) 177, affirmed by the Circuit Court of Appeals for the Fourth Circuit in 42 F. (2) 101, cannot therefore in our opinion be relied on as authority in this case. It is true that there are many provisions of the Texas primary law which are designed to safe-guard the ballot and secure fair and honest elections; but none of those provisions can justly be said to deny to any citizen of Texas the right to vote in a primary election.

The judgment is affirmed.

[fol. 45] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 5758

L. A. NIXON

versus

JAMES CONDON and C. H. KOLLE

JUDGMENT—May 16, 1931

This cause came on to be heard on the transcript of the record from the District Court of the United States for

the Western District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the appellant, L. A. Nixon, and the sureties on the appeal bond herein, F. M. Murchison and E. W. Kayser, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 46] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 47] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 19, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Fifth Circuit. Term No. 265. L. A. Nixon, petitioner, vs. James Condon and C. H. Kolle. Petition for a writ of certiorari and exhibit thereto. Filed July 30, 1931. File No. 36,079.

INDEX.

PAGE

PETITION FOR WRIT OF CERTIORARI 1
Statute and Resolution in Question 2
Petitioner's Injury 3
Jurisdiction 4
Decision of District Court 6
Decision of Circuit Court of Appeals 7

CERTIFICATE OF COUNSEL FOR WRIT 9

BRIEF FOR PETITIONER 11
Preliminary Statement 11
Jurisdiction 14
Grounds on Which Writ is Sought 16

POINTS:

I. The decision of the Circuit Court of Appeals in this case is in conflict with the applicable decisions of this Court 17

(A) Under the authority of Nixon v. Herndon and other cases, Chapter 67 of the Laws of 1927 of Texas and the resolution of the Democratic State Executive Committee adopted under delegation of authority from the Texas Legislature are unconstitutional and void under the Fourteenth and Fifteenth Amendments to the Constitution of the United States 17

(i) Analysis of the Texas statutes and the attempt to nullify Nixon v. Herndon 19

PAGE

(ii) State Executive Committee as an agency of the Legislature. 21

(iii) The "inherent power" argument. 23

(iv) Texas cases defining legislative and party powers. 24

(B) The respondents in refusing to permit the petitioner to vote were acting in their official capacities as state officers, because they were applying state powers to a public purpose. Under doctrine of Home Tel. & Tel. Co. v. Los Angeles, their conduct violated the constitutional rights of the petitioner irrespective of the validity of Chapter 67 of the Laws of 1927. 28

(i) Powers vested in judges of election. 29

(ii) Acts of respondents attributable to state. 31

II. The decision of the Circuit Court of Appeals in this case is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in Bliley v. West. 34

III. The action of the respondents was in violation of Section 31 of Title 8 of the United States Code. 36

IV. This Court should assume jurisdiction of this case by writ of certiorari because of the importance of the question raised. 37

CASES CITED.

PAGE

Anderson v. Ashe, 62 Tex. Civ. App. 262, 130 S. W. 1044 23
Ashby v. White, 2 Ld. Raym. 938, 3 id. 320 18
Ashford v. Goodwin, 103 Tex. 491, 131 S. W. 535 23

Binderup v. Pathe Exchange, 263 U. S. 291 16
Bliley v. West, 42 Fed. (2nd) 101 ..... 7, 16, 34
Briscoe v. Boyle (Tex.), 286 S. W. 275 ..... 23, 24, 26, 27

Child Labor Tax Case, 259 U. S. 20 21
Commonwealth v. Willcox, 111 Va. 849 34

Ford v. Surgett, 97 U. S. 594 22

General Investment Co. v. N. Y. Central R. R. Co., 271 U. S. 228 16
Giles v. Harris, 189 U. S. 475 18
Guinn v. United States, 238 U. S. 347 ..... 21, 39

Hammer v. Dagenhart, 247 U. S. 251 21
Hendricks v. State of Texas, 20 Tex. Civ. App. 178 ... 33
Home Tel. & Tel. Co. v. Los Angeles, 227 U. S. 278 .. 8, 22, 28, 31

Kimbrough v. Barnett, 93 Tex. 301, 55 S. W. 120 33
King Mfg. Co. v. Augusta, 277 U. S. 100 ..... 22, 31

Lincoln v. Hapgood, 11 Mass. 350 33
Lindgren v. United States, 281 U. S. 38 24
Love v. Griffith, 266 U. S. 32 ..... 27, 28, 39
Love v. Wilcox (Tex.), 28 S. W. (2nd) 515 .. 23, 24, 27, 30

Myers v. Anderson, 238 U. S. 368 ..... 16, 21
Newberry v. United States, 256 U. S. 232 37

PAGE

Nixon v. Condon:
34 Fed. (2nd) 464 (District Court) 6, 13
.. Fed. (2nd) ... (Circuit Court) 35
Nixon v. Herndon, 273 U. S. 536 .. 2, 7, 8, 13, 16, 17, 18, 19, 22, 23, 26, 27, 35, 38

Standard Scale Co. v. Farrell, 249 U. S. 571 ..... 22, 31
State ex rel. Moore v. Meharg (Tex. Civ. App.), 287 S. W. 670 37
Swafford v. Templeton, 185 U. S. 487 ..... 16, 37

Tumey v. Ohio, 273 U. S. 510 33

Waples v. Marrast, 108 Tex. 5, 184 S. W. 181 22
West v. Bliley, 42 Fed. (2nd) 101, aff'g 33 Fed. (2nd) 177 ..... 7, 8, 16, 36, 39
White v. Lubbock (Tex. Civ. App.), 30 S. W. (2nd) 722 22
Wiley v. Sinkler, 179 U. S. 58 ..... 16, 18, 37
Williams v. Bruffy, 96 U. S. 176 22
Willis v. Owen, 43 Tex. 41 33

Yick Wo v. Hopkins, 118 U. S. 356 38

TEXTS AND NOTES.

American Law Reports, Vol. 53, p. 595 33
"Commerce Clause and Police Power," Thomas Reed Powell, 12 Minn. Law Rev. 321, 470 24
"Disenfranchisement of the Negro at the Primaries," Meyer M. Brown, 23 Mich. Law Rev. 279 ..... 23, 38
"Primary Elections," Merriam & Overacker (1928 Edition) 23

REFERENCES TO CONSTITUTION.

PAGE

Constitution of the United States:
Fourteenth Amendment.....6, 7, 13, 17, 18
Fifteenth Amendment.....6, 7, 13, 17, 18

UNITED STATES STATUTORY REFERENCES.

Judicial Code:
Section 24 (1).....5, 14
Section 24 (11).....5, 14, 18
Section 24 (12).....5, 14, 18
Section 24 (14).....5, 14, 18
Section 240.....2, 16

Revised Statutes:
Section 2004..... 6

United States Code:
Title 8, Section 31.....5, 15, 36
Title 8, Section 43.....5, 15
Title 28, Section 41 (1).....5, 13, 14, 18
Title 28, Section 41 (11).....5, 13, 14, 18
Title 28, Section 41 (12).....5, 13, 14, 18
Title 28, Section 41 (14).....5, 13, 14, 18
Title 28, Section 347.....2, 5, 16

Supreme Court Rules:
Rule 28, par. 5 (b)..... 8

TEXAS STATUTORY REFERENCES.

Revised Civil Statutes of 1925:
Elections—Chapter 8..... 29
Elections—Chapter 13.....12, 21
Elections—Chapter 13, Article 3105.....29, 30
Elections—Chapter 13.....12, 20, 21
Elections—Chapter 13, Article 3093-a (former Article 3107).....2, 17
Elections—Chapter 13, Article 3107 (Chap. 67, Laws of 1927).....2, 3, 4, 5, 6, 7, 12, 13, 17, 19, 22, 23, 24, 25, 26, 27, 28, 38
Resolution of Democratic State Executive Committee.....3, 4, 5, 12, 27

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Supreme Court of the United States

OCTOBER TERM, 1931.

No.....

L. A. NIXON,
Petitioner,

against

JAMES CONDON and C. H. KOLLE,
Respondents.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner above named hereby respectfully applies for a writ of certiorari whereby the United States Circuit Court of Appeals for the Fifth Circuit will be required to certify to this Honorable Court for its review the transcript of record in the case entitled "L. A. Nixon, Appellant, *versus* James Condon and C. H. Kolle, Appellees, No. 5758," in which the said Circuit Court of Appeals on May 16, 1931, affirmed a judgment rendered on July 31, 1929, by the United States District Court for the Western District of Texas, El Paso Division, which dismissed the petition, filed therein by the petitioner in an action to recover damages from the respondents for their wrongful refusal to permit him to vote at a Democratic primary election at which they were the duly appointed judges. In

support hereof (under §347, Title 28, U. S. Code; Judicial Code, §240) your petitioner respectfully alleges:

FIRST: On March 7, 1927, this Honorable Court, in *Nixon* v. *Herndon et al.*, 273 U. S. 536, held your petitioner entitled to recover damages against election officials who had refused to permit him to vote at a Democratic primary election in Texas because he was a Negro and who claimed that he was expressly prohibited from participating therein by Article 3107 of Chapter 13 of the Revised Civil Statutes of Texas, originally enacted in 1923 as Article 3093-a thereof. This Honorable Court held (a) that "the same reasons that allow a recovery for denying the plaintiff a vote at a final election allow it for denying a vote at the primary election that may determine the final result"; (b) that Article 3107 (3093-a), under which the judges had purported to act, was clearly invalid as a violation of the Fourteenth Amendment to the Constitution of the United States and therefore afforded them no defense; and (c) that your petitioner could maintain the action against them in a District Court of the United States despite the fact that the parties therein were all citizens of the State of Texas.

Statute and Resolution in Question.

SECOND: Immediately after the decision of this Honorable Court, and as your petitioner verily believes, in order to circumvent and destroy its effect in establishing the constitutional right of Negro citizens of Texas not to be excluded from primary elections therein solely because of their color, the Legislature of the State of Texas, by Chapter 67 of the Laws of 1927, approved June 7, 1927, enacted as follows:

> "Section 1. That Article 3107 of Chapter 13 of the Revised Civil Statutes of Texas be and the same is hereby repealed and a new article is hereby enacted so as to hereafter read as follows:

'Article 3107. Every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party; provided that no person shall ever be denied the right to participate in a primary in this State because of former political views or affiliations or because of membership or non-membership in organizations other than the political party.'

Sec. 2. *The fact that the Supreme Court of the United States has recently held Article 3107 invalid, creates an emergency and an imperative public necessity* that the Constitutional Rule requiring bills to be read on three several days in each House be suspended and said rule is hereby suspended, and that this Act shall take effect and be in force from and after its passage, and it is so enacted." (Italics petitioner's.)

THIRD: Thereafter, purporting to act pursuant to the authority conferred by Chapter 67 of the Laws of 1927 as aforesaid, the State Executive Committee of the Democratic Party in Texas adopted the following resolution:

"'Resolved: That all white Democrats who are qualified and under the Constitution and laws of Texas and who subscribe to the statutory pledge provided in Article 3110, Revised Civil Statutes of Texas, and none other, be allowed to participate in the primary elections to be held July 28, 1928, and August 25, 1928, and further, that the Chairman and Secretary of the State Democratic Executive Committee be directed to forward to each Democratic County Chairman in Texas a copy of this resolution for observance.'"

Petitioner's Injury.

FOURTH: On July 28, 1928, a Democratic primary election was held in the State of Texas for the purpose of selecting the candidates of the Democratic Party for all

precinct, county, district and state officers, and for representatives in the Congress of the United States and for United States Senator.

FIFTH: Your petitioner then was and now is a Negro as defined by the statutes of the State of Texas. He was born in the State of Texas of parents who were citizens of the United States. On July 28, 1928, he was a resident of Precinct No. 9 in the City and County of El Paso, Texas, a bona fide member of the Democratic Party of the State of Texas, and possessed all the qualifications required under the laws of Texas of voters and electors in order to vote in Precinct No. 9 at the said primary election. He also was not subject to any disqualification or disability to vote thereat unless the fact that he was a Negro was itself a disqualification or disability depriving him of the right to vote at the said election.

SIXTH: On the said July 28, 1928, your petitioner duly presented himself at the polling place in Precinct No. 9, and at an hour prescribed by law for the holding of the said primary election, and requested the respondents Condon and Kolle to supply him with a ballot and permit him to vote. The said respondents, who were the duly appointed judges of election at the said election in the said Precinct No. 9, refused to furnish your petitioner with a ballot or to permit him to vote, assigning as the reason therefor that pursuant to the resolution of the State Democratic Executive Committee of Texas, adopted under the authority of Chapter 67 of the Laws of 1927, the County Democratic Executive Committee of El Paso County, Texas, had instructed them to deny all Negroes the right to vote at the said election. The said resolution is the same one set forth in paragraph Third of this petition.

Jurisdiction.

SEVENTH: Your petitioner thereafter commenced an action against the said respondents to recover $5,000 dam-

ages from them for their wrongful refusal to permit him to vote at the said election. This action was commenced in the United States District Court for the Western District of Texas, El Paso Division. The jurisdiction of the Court was based upon the United States Judicial Code, Sections 24 (1), (11), (12) and (14); 28 United States Code, Sections 41 (1), (11), (12) and (14) (see, also, 8 U. S. C., Secs. 31 and 43).

EIGHTH: Your petitioner filed a petition, in the said action in the said District Court, setting out the facts on which he relied to establish the jurisdiction of the Court and his right of action against the respondents. In the said petition he alleged with greater detail all the facts hereinabove set forth. He also alleged, among other facts, that Chapter 67 of the Laws of 1927 was enacted by the Legislature of the State of Texas, and that the resolution of the State Democratic Executive Committee was adopted pursuant thereto, *in order to defeat and destroy* the effect of the decision of this Honorable Court, rendered in *Nixon* v. *Herndon* as aforesaid, and in order to deprive all Negro citizens in Texas, including your petitioner, of the right to vote at Democratic primary elections in the State of Texas, guaranteed and secured them by the Constitution and laws of the United States. He further alleged that the Democratic Party is the only party actually required under the laws of Texas to select its candidates by primary election; that its candidates are invariably elected by large majorities at the final election, and that the primary election at which those candidates are chosen is, to all practical intents and purposes, the real election which actually determines the persons who will inevitably be elected to office at the final election. Your petitioner further alleged that Chapter 67 of the Laws of 1927, and the resolution of the State Democratic Executive Committee, adopted pursuant thereto, were violative of the Fourteenth and Fifteenth Amendments to the Constitution of the United States, and contrary to the laws enacted by the Congress of the United States, especially including Section 31 of Title 8 of the

United States Code (R. S., Sec. 2004). Your petitioner further alleged that the action of the respondents Condon and Kolle as judges of the said election, in refusing him the right to vote at the said election, was wrongful, unlawful and violative of his constitutional rights, and that it deprived him of a valuable political right to his damage in the sum of $5,000.

NINTH: The respondents thereafter filed a motion in the said District Court to dismiss the petition in the said action against them. The motion, on various grounds, challenged the sufficiency of the facts set forth in the petition, both to establish the jurisdiction of the Court and the petitioner's right of action against the respondents.

Decision of District Court.

TENTH: Hon. Charles A. Boynton, the judge who heard the motion in the District Court, thereafter filed a written opinion stating the reasons why the motion to dismiss should be granted. This opinion is set out on pages 23-38 of the transcript of record, and has also been reported in 34 F. (2nd) 464. In his opinion Judge Boynton held: (1) that the Fourteenth and Fifteenth Amendments to the Constitution of the United States cannot be violated except by some action properly to be characterized as state action; (2) that Chapter 67 of the Laws of 1927 on its face directs no action in violation of the Federal Constitution; (3) that the action of the State Democratic Committee and the judges of election, complained of in the petition, was not state action, because (a) the members of the committee and the judges of election were not paid by the state, and so were not like the persons officiating at the Illinois and Virginia primaries, who have been held liable in damage to qualified citizens to whom they denied the right to vote, (b) they were not officers of the state, (c) they were acting only as private representatives of the Democratic political party, and (d) the members of the

Democratic Party possess inherent power to prescribe the qualifications of those who may vote at its primaries, irrespective of and without reference to Chapter 67 of the Laws of 1927; and (4) that a primary election is not an election within the meaning of the Fifteenth Amendment, because (a) a political party is not a governmental agency, and (b) at the time the Thirteenth, Fourteenth and Fifteenth Amendments were adopted, primary elections were unknown and therefore may not be held to be covered by these amendments.

Decision of Circuit Court of Appeals.

ELEVENTH: After the entry of a judgment in the said District Court dismissing his petition, your petitioner duly appealed to the United States Circuit Court of Appeals for the Fifth Circuit. The Circuit Court affirmed the judgment below, holding, in a written opinion, (1) that the Fourteenth and Fifteenth Amendments apply to state action, not to action of private individuals or associations; (2) that this case differs from *Nixon* v. *Herndon,* because there the element of state action was supplied by the enactment of a statute which expressly discriminated against Negroes, whereas here the statute merely recognized an existing power on the part of the Democratic State Executive Committee to fix the qualifications of its members; (3) that the election officials who rejected the petitioner were appointed by the Democratic State Executive Committee, and were not paid by the state, and (4) that the decision in *West* v. *Bliley* is distinguishable because there the State of Virginia conducted the primary and paid the expenses thereof, whereas in Texas the state merely regulates a privately conducted primary election so as to secure a fair and honest election.

TWELFTH: Your petitioner respectfully submits that the judgment dismissing his petition in the District Court, and the affirmance thereof by the Circuit Court of Appeals, were wholly erroneous for the reasons, among others, spe-

cifically stated in the assignment of errors contained in the record (R. 16-20) and discussed in the brief hereto annexed, and that this Honorable Court should grant the writ of certiorari prayed for herein in order to review and reverse the action of the courts below.

Among other grounds which here exist for granting this writ, your petitioner respectfully invites attention to the following specified in Rule 28, paragraph 5 (b) of the Rules of this Honorable Court: (1) The Circuit Court of Appeals has decided either (a) "a federal question in a way probably in conflict with" *Nixon* v. *Herndon* and *Home Tel. & Tel. Co.* v. *Los Angeles,* applicable decisions of this Honorable Court. (2) The Circuit Court of Appeals "has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter" in *West* v. *Bliley,* 42 F. (2nd) 101. (3) The Circuit Court of Appeals "has decided an important question of general law in a way probably untenable or in conflict with the weight of authority." The existence of each of these grounds for granting the writ prayed for will become apparent during the course of the argument in the supporting brief, annexed hereto and made a part hereof.

WHEREFORE, your petitioner prays this Honorable Court to issue a writ of certiorari directing Circuit Court of Appeals for the Fifth Circuit to certify the record in this case to this Court for review and determination.

Dated, July 29, 1931.

L. A. NIXON,
Petitioner,
By JAMES MARSHALL,
Petitioner's Counsel,
Office & Post Office Address,
165 Broadway,
New York City.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, } ss.:
COUNTY AND STATE OF NEW YORK,

JAMES MARSHALL, being duly affirmed, says that he is one of the counsel for L. A. Nixon, the petitioner herein, that he prepared the foregoing petition and that the allegations thereof are true as he verily believes.

JAMES MARSHALL.

Subscribed and affirmed before me
this 29th day of July, 1931.

NATHANIEL H. KUGELMASS,
Notary Public,
Kings County.
Kings Co. Clks. No. 560, Reg. No. 2261.
N. Y. Co. Clks. No. 565, Reg. No. 3K370.
Commission expires March 30, 1933.

(Seal)

CERTIFICATE OF COUNSEL.

I hereby certify that in my opinion the foregoing Petition for Writ of Certiorari is well founded in law.

JAMES MARSHALL,
Counsel.

Supreme Court of the United States

OCTOBER TERM, 1931.

L. A. NIXON,
Petitioner,

vs.

JAMES CONDON and C. H. KOLLE,
Respondents.

BRIEF OF PETITIONER ON APPLICATION FOR WRIT OF CERTIORARI.

Preliminary Statement.

The petitioner, a citizen of the United States and of the State of Texas, brought this action in the United States District Court for the Western District of Texas against the respondents, who were judges of election in Precinct No. 9, El Paso County, Texas, to redress an injury which he sustained by reason of the acts of the respondents in their official capacities (R. 2).

The petitioner is a Negro. He was a bona fide member of the Democratic Party of the State of Texas and in every respect was entitled to participate in elections held within that state, whether for the nomination of candidates for office or otherwise (R. 3).

On July 28, 1928, a Democratic Primary was held in the State of Texas to select candidates not only for state officers, but also for United States Senator and Congressmen (R. 2). On that day the petitioner presented himself at the polls and offered to take the pledge to support the

nominees of the Democratic Primary Election held on that day and to comply in every respect with the valid requirements of the laws of Texas, save as they violated the privileges conferred upon and guaranteed to him by the Constitution and Laws of the United States. He requested the respondents to supply him with a ballot and permit him to vote at the Democratic Primary Election held on that day and the respondents refused to permit the petitioner to vote or to furnish him with a ballot and stated as the reason that under instructions from the Democratic County Chairman, pursuant to a resolution of the State Democratic Executive Committee adopted under the authority of Chapter 67 of the Laws of 1927 of Texas, only *white* Democrats were allowed to participate in the Democratic Primary then being held. *The respondents ruled that the petitioner was not entitled to vote in the Democratic Primary because he was a Negro* (R. 3, 4, 7). The resolution of the State Democratic Executive Committee of Texas, under the color of which respondents purported to act, reads as follows:

> "Resolved: That all white Democrats who are qualified and under the Constitution and laws of Texas and who subscribe to the statutory pledge provided in Article 3110, Revised Civil Statutes of Texas, and none other, be allowed to participate in the primary elections to be held July 28, 1928, and August 25, 1928, and further, that the Chairman and secretary of the State Democratic Executive Committee be directed to forward to each Democratic County Chairman in Texas a copy of this resolution for observance."

The statute under the authority of which the Democratic State Executive Committee adopted this resolution, Chapter 67 of the Laws of 1927 (Article 3107, Chapter 13 of the Revised Civil Statutes of Texas), gave authority to the State Executive Committee to prescribe qualifications of party members and determine who shall be qualified to vote or participate in such political party. This statute was passed as an "emergency" measure because, as the

statute itself proclaims, "the fact that the Supreme Court of the United States has recently held Article 3107 invalid, creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each House be suspended * * *."

The decision of this Court which was referred to by the Texas Legislature was the case of *Nixon* v. *Herndon*, 273 U. S. 536, which held unconstitutional a statute of the State of Texas which expressly prohibited Negroes from participating in Democratic Primary Elections held in that state. It is alleged in the complaint, and the history of the Act sustains the allegation, that Chapter 67 of the Laws of 1927 was an attempt to evade the decision of this Court in *Nixon* v. *Herndon* and to provide, by delegation to the party Executive Committee, the disenfranchisement of Negroes which this Court held could not be done by direct action of the Legislature (R. 6, 7, 8).

This suit was brought under Section 41 of Title 28 of the United States Code, subdivisions 1, 11, 12 and 14 being applicable.

Judgment is demanded against the respondents (a) because Chapter 67 of the Laws of 1927 of Texas and the resolution of the Democratic State Executive Committee thereunder denied the plaintiff of the equal protection of the laws of Texas in violation of the Fourteenth Amendment to the United States Constitution; (b) because the plaintiff's right to vote at the Primary Election was denied and abridged by the resolution of the Democratic State Executive Committee and the action of the Legislature of Texas on account of his race and color in violation of the Fifteenth Amendment to the Constitution; (c) because the resolution and statute in question are contrary to Section 31 of Title 8 of the United States Code; and (d) because the respondents acting under a delegation of state power violated those sections of the Constitution and that Act of Congress when they denied the petitioner the right to vote on the ground that he is a Negro (R. 8-12).

The plaintiff's petition was dismissed by the District Court (34 Fed. [2nd] 464) and the opinion of Judge Boyn-

ton is printed on pages 23 *et seq.* of the record. The Circuit Court of Appeals for the Fifth Circuit affirmed the decision of the District Court with an opinion (Fed. [2nd]) printed on pages 40 *et seq.* of the record.

Jurisdiction.

Jurisdiction of Federal Courts over this suit is provided by Section 41 of Title 28 of the United States Code (Judicial Code, Sec. 24 as amended). It is there provided that the District Court shall have original jurisdiction over:

> "(1) * * * *First.* Of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority * * *."

Subdivision 11 provides for suits for injuries on account of acts done under laws of the United States "or to enforce the right of citizens of the United States to vote in the several States." Subdivision 12 deals with suits concerning civil rights and gives to the District Courts jurisdiction

> "Of all suits authorized by law to be brought by any person for the recovery of damages on account of any injury to his person or property, or of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in Section 47 of Title 8."

In subdivision 14 it is provided that the Court shall have jurisdiction

> "Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, of any right, privilege, or immunity secured by the

> Constitution of the United States or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

This suit is not only a suit to redress deprivation of civil rights by reason of the unconstitutional restraint upon the petitioner's right of suffrage in violation of the Fourteenth and Fifteenth Amendments, but it is also based specifically upon the violation of a Federal statute, to-wit, Section 31, Title 8 of the United States Code, which provides:

> "Section 31. *Race, color, or previous condition not to affect right to vote.* All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding."

Section 43 of Title 8 of the United States Code also grants a right of action for violation of the right of franchise granted by Section 31.

It should in this connection be noted that not only candidates for local office, but also for United States Senator and Congressmen were nominated at the primary held on July 28, 1928 (R. 2).

The Circuit Court of Appeals accepted jurisdiction of this cause and decided the motion to dismiss upon the merits (R. 41).

The District Court, after deciding the motion on the merits, evidently confused the question of jurisdiction and the question of absence of merits in the discussion in the last paragraph of the opinion. This distinction between jurisdiction and merits has been clearly set forth by this

Court in *Binderup* v. *Pathe Exchange*, 263 U. S. 291, at page 305, and *General Investment Co.* v. *N. Y. Central R. R.*, 271 U. S. 228, at page 230.

In cases similar to this one this Court has assumed jurisdiction.

Wiley v. *Sinkler*, 179 U. S. 58-65;
Swafford v. *Templeton*, 185 U. S. 487;
Myers v. *Anderson*, 238 U. S. 368;
Nixon v. *Herndon*, 273 U. S. 536.

Grounds on Which Writ of Certiorari Is Sought.

The petitioner now prays for a writ of certiorari* for the following reasons, which will be discussed *in extenso* in the subsequent pages.

(A) The decision of the Circuit Court of Appeals for the Fifth Circuit in this case is in conflict with applicable decisions of this Court.

(B) The decision of the Circuit Court of Appeals in this case is in conflict with the recent applicable decision of the Circuit Court of Appeals for the Fourth Circuit in *West* v. *Bliley*, 42 Fed. (2nd) 101.

(C) Because of the importance of the questions raised by this suit, which, if not reversed, will legalize a practice which disenfranchises the Negroes of Texas.

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* See Title 28, §347, U. S. Code; Judicial Code, §240.

POINTS.

I.

The decision of the Circuit Court of Appeals in this case is in conflict with the applicable decisions of this Court.

A.—UNDER THE AUTHORITY OF NIXON V. HERNDON AND OTHER CASES, CHAPTER 67 OF THE LAWS OF 1927 OF TEXAS AND THE RESOLUTION OF THE DEMOCRATIC STATE EXECUTIVE COMMITTEE ADOPTED UNDER DELEGATION OF AUTHORITY FROM THE TEXAS LEGISLATURE ARE UNCONSTITUTIONAL AND VOID UNDER THE FOURTEENTH AND FIFTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Nixon v. *Herndon*, 273 U. S. 536, is in all respects except one identical with the present case. There Nixon, this same petitioner, brought his action against the judges of election for refusing to permit him to vote at a primary election in Texas. Damages were sought, as here, for $5,000. The primary election then, as in this case, was held in El Paso for the nomination of candidates for Senator and representatives to Congress and state and other officers on the Democratic ticket. Then, as in this case, the defendant judges of election refused to permit the petitioner to vote in the Democratic Party primary because he was a Negro. In that case their action was based upon the Texas statute enacted in May, 1923, designated Article 3093-a (the former Art. 3107, Texas Rev. Civ. Stats.), which provided that "in no event shall a negro be eligible to participate in a Democratic Party primary election held in the State of Texas," etc. Now the judges of election have refused to permit the petitioner to vote at the primary because of the resolution of the State Democratic Executive, quoted *supra*, which was adopted pursuant to Chapter 67 of the Laws of 1927 and which restricts voting in Democratic primary elections to *"white Democrats."* In both cases it has been contended that the deprivation of the

petitioner of the right to vote was in violation of the Fourteenth and Fifteenth Amendments. Then, as now, the defendants moved to dismiss on the ground that the subject matter was political and not within the jurisdiction of the Court and that no violation of the amendments was shown.

The holdings of this Court in *Nixon* v. *Herndon* which are controlling here are that (1) the plaintiff was injured by a deprivation of civil rights, and (2) this deprivation was without constitutional justification. The Court decided:

(A) Although the petition concerned political action, it alleged and sought recovery for private damage and the suit could be maintained under the authority of *Ashby* v. *White*, 2 Ld. Raym. 938, 3 *id.* 320; *Wiley* v. *Sinkler, supra*; *Giles* v. *Harris*, 189 U. S. 475, 485; Judicial Code, Sections 24 (11), (12), (14).*

(B) There is no distinction between the petitioner's right to vote at a primary election and at a final election.**

(C) The Court did not pass upon the Fifteenth Amendment "because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth." And the Court then pointed out that the Fourteenth Amendment was passed with a special intention to protect Negroes from discrimination (and the same, of course, is true of the Fifteenth Amendment).

(D) Finally, it was held that the Texas statute of May, 1923, was unconstitutional because in assuming to forbid Negroes to take part in primary elections, "the importance of which we have indicated," it was discriminating against them by the distinction of color alone and "color cannot

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* Section 41, Title 28, U. S. Code.

** In that case Mr. Justice Holmes said, page 540: "If the defendant's conduct was a wrong to the plaintiff the same reasons that allow a recovery for denying the plaintiff a vote in a final election allow it for denying a vote at the primary election that may determine the final result."

be made the basis of a statutory classification affecting the right set up in this case."

The injury in this case is identical with that in *Nixon* v. *Herndon*.

The sole question before this Court is whether constitutional justification exists in this case. Absence of constitutional justification will be demonstrated if it is established that the action of the respondents as judges of elections was taken under state authority or was in effect action by the state itself. The present case will then come within the category of Nixon v. Herndon.

Analysis of the Texas Statutes and the Attempt to Nullify *Nixon* v. *Herndon*.

Let us first examine Chapter 67 of the Laws of 1927. It reads as follows (R. 5, 6):

"AUTHORIZING POLITICAL PARTIES THROUGH STATE EXECUTIVE COMMITTEES TO PRESCRIBE QUALIFICATIONS OF THEIR MEMBERS.

(H. B. No. 57)

Chapter 67.

An Act to repeal Article 3107 of Chapter 13 of the Revised Civil Statutes of Texas, and substituting in its place a new article providing that every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party, and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Section 1. That Article 3107 of Chapter 13 of the Revised Civil Statutes of Texas be and the same is hereby repealed and a new article is hereby enacted so as to hereafter read as follows:

'Article 3107. Every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party; provided that no person shall ever be denied the right to participate in a primary in this State because of former political views or affiliations or because of membership or non-membership in organizations other than the political party.'

Sec. 2. The fact that the Supreme Court of the United States has recently held Article 3107 invalid, creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended and said rule is hereby suspended, and that this Act shall take effect and be in force from and after its passage, and it is so enacted.

Approved June 7, 1927.
Effective 90 days after adjournment."

The statute declares an emergency to exist. What was the emergency in June, 1927? It was, as expressed in Section 2, the fact that on March 7, 1927, this Court had declared the existing statute restricting Negro voting in Democratic primaries to be unconstitutional. That created an emergency in that Negroes might legally vote in Democratic primaries unless something were done.

The respondents claimed, and the District Court and Circuit Court of Appeals held in this case, that the political parties had inherent power to determine who should vote at party primaries. The Texas Legislature, however, has not taken this same view. Having already assumed control over primary elections,* it proceeded by Chapter

* Primary elections are themselves compulsory under the Texas statutes for all parties which cast more than 100,000 votes at the last general election (1925 Tex. Rev. Civ. Stats., Elections, Art. 3101). Actually, this provision has been applied, and now does apply only to the Democratic Party because it alone has been able to muster the requisite number of votes. The time, place and manner of holding Primary Elections, as well as of determining and contesting the results thereof, are comprehensively and minutely described by statutory provisions (*Idem.*, Arts. 3102-3105, 3108, 3109-3114, 3116-3117, 3120, 3122-3127, 3146-3153).

67 of the Laws of 1927 to delegate to the state executive committee of every political party in the state the power to prescribe qualifications for membership and who should be qualified to vote or otherwise participate in the political parties.

That it was the legislative intention to evade and nullify the decision of this Court appears upon the face of the enactment; and from the wording of the statute itself it is equally apparent that the Legislature was not surrendering the control of the franchise in primary elections, but was providing for the control in another way. The statute was, to quote its own terms, "to repeal Article 3107 of Chapter 13 of the Revised Civil Statutes of Texas, and *substituting in its place* a new Article * * *." If the Democratic Legislature of Texas could not constitutionally forbid Negroes to vote in primaries, it could nevertheless with a feeling of assurance entrust to the Democratic State Committee the power to enact such prohibition and achieve the same end. This Court has held that a legislative body cannot accomplish by indirection something which it is without power to do directly (*cf. Hammer* v. *Dagenhart*, 247 U. S. 251, and *Child Labor Tax Case*, 259 U. S. 20).

Thus this Court has held that a state could not re-establish the *status quo* of the days before the adoption of the Fifteenth Amendment through the medium of "grandfather clauses" which sought to exclude Negro voters from the polls.

Guinn v. *The United States*, 238 U. S. 347;
Myers v. *Anderson*, 238 U. S. 368.

State Executive Committee as an Agency of the Legislature.

The Legislature having made the Democratic State Executive Committee its agency, the old maxim *qui facit per alium facit per se* is applicable. It follows that the resolution of the executive committee must be read as an inte-

gral part of the statute itself, and when superimposed upon Chapter 67 of the Laws of 1927, this new section is identical with the old Article 3107, which was considered and condemned in *Nixon* v. *Herndon.*

It is not necessary to hold that the Democratic State Executive Committee was for all purposes the agent of the state, but in so far as the powers of the Legislature to control and supervise primary elections and determine the eligibility of the participants was delegated to it, the executive committee was *pro tanto* the agency of the state. From this point of view it is, therefore, immaterial whether the Legislature and the courts of Texas may or may not deem the expenses of the party or the costs of the primaries to be proper charges upon the state treasury (*cf. Waples* v. *Marrast,* 108 Tex. 5, 184 S. W. 181, and *White* v. *Lubbock,* Tex. Civ. App. 1930, 30 S. W. [2nd] 722).

It is elementary that a state cannot perform by an agency an act which it cannot accomplish in its own name, that it cannot give the force of law to a prohibited enactment, from whatever source originating.

Williams v. *Bruffy,* 96 U. S. 176;
Ford v. *Surgett,* 97 U. S. 594;
King Manufacturing Co. v. *Augusta,* 277 U. S. 100, 107-114;
Home Tel. & Tel. Co. v. *Los Angeles,* 227 U. S. 278.

In *Standard Scale Co.* v. *Farrell,* 249 U. S. 571, at page 577, Mr. Justice Brandeis said:

> "* * * For the protection of the Federal Constitution applies, whatever the form in which the legislative power of the State is exerted; that is, whether it be by a constitution, an act of the legislature, or an act of any subordinate instrumentality of the State exercising delegated legislative authority, like an ordinance of a municipality or an order of a commission."

The "Inherent Power" Argument.

The contention has been advanced by the respondents, and approved by the courts below (R. 36, 42), that political parties have *inherent power* to prescribe the qualifications of their members and of those who may vote at primary elections held for the purpose of selecting their candidates for the general election. This being so, it is urged, the Democratic State Executive Committee had inherent power to adopt a rule disqualifying Negroes from voting at Democratic primary elections and to instruct the judges at such elections to exclude all Negroes from participation.

This argument has no basis in the political rationale of this age. The state's right to control primaries and to adopt *reasonable* classifications has not been questioned even by *Nixon* v. *Herndon*. It is recognized by the Texas courts in

Love v. *Wilcox*, Tex. , 28 S. W. (2nd) 515;
Briscoe v. *Boyle* (Tex.), 286 S. W. 275;
Ashford v. *Goodwin*, 103 Tex. 491, 131 S. W. 535;
Anderson v. *Ashe*, 62 Tex. C. V. App. 262, 130 S. W. 1044.

There is ample authority for the proposition that political parties in their relations to elections and primaries are state agencies. In *"Primary Elections,"* by Merriam & Overacker (1928 Edition), the authors state at page 140:

> "The theory of the party as a voluntary association has been completely overthrown by the contrary doctrine that the party is in reality a governmental agency subject to legal regulations and control."

And see the able article by Meyer M. Brown in 23 *Michigan Law Review* 279.

It is clear that before the enactment of Chapter 67 of the Laws of 1927 (present Art. 3107 of the Rev. Civ. Stats.,

Texas), the state executive committee had neither inherent nor statutory power to disqualify Negroes from voting at primary elections. This conclusion is inevitable from the meticulous manner in which the Legislature has set forth the machinery by which primaries are to be governed (see p. , *infra*) and the very face of Chapter 67 of the Laws of 1927 which purports to give the power of definition of party membership to the state executive committee within specified limitations. If the power were already inherent in the parties, this grant would be idle.

This does not mean that for some purposes the executive committee may not have inherent power still unaffected by the action of the Legislature. Nor does it mean that if the Legislature had not acted with respect to primaries the parties would not have had jurisdiction over the composition of the electorate at such primaries. These are matters that need not now be questioned or decided. It is sufficient that the Legislature has spoken and it therefore must be deemed to have assumed full control of the situation (*Briscoe* v. *Boyle,* Tex., 1926, 286 S. W. 275; *Love* v. *Wilcox,* Tex., 1930, 28 S. W. [2nd] 515). If this were not the case, it was unnecessary for the Legislature to have adopted Chapter 67 of the Laws of 1927. The emergency there stated to exist would have been a mere figment of the legislative imagination and the act itself a voice in vacuum. Only as a last resort can a Federal Court deem such to be the fact. Fruitful analogy may be found in the relation of Congress and the state legislatures in connection with the commerce clause and state police powers.*

Texas Cases Defining Legislative and Party Powers.

The argument of "inherent power" has been disposed of by the Texas courts. *Love* v. *Wilcox,* Tex., 1930, 28 S. W. (2nd) 515, arose under the same statute under considera-

* See article by Thomas Reed Powell, 12 Minn. Law Rev. 321, 470; *Lindgren* v. *U. S.,* 281 U. S. 38, 46.

tion in this case. There the plaintiff sought a mandamus to compel the Democratic State and County Executive Committees to place his name on a gubernatorial ballot of the Democratic primary and to desist from enforcing the resolution passed in February, 1930, by the Democratic State Executive Committee, which precluded anyone from becoming a candidate at the Democratic primaries if he had voted against the party in the 1928 elections after having participated in the Democratic primary of that year. The Supreme Court of Texas held that the provisions of Article 3107 of the Revised Civil Statutes of Texas (Chap. 67 of the Laws of 1927) prohibit the party executive committee from excluding a candidate because of past disloyalty to the party. In that case the party claimed that it had inherent power to manage its own affairs and determine who could present his name for nomination at a primary. The Court considered the broad question of party power in connection with applicable legislation. The Court said in this connection:

> "This case comes clearly within the class of cases involving the enforcement of the sovereignty of the state and the protection of the citizen's right to effective participation in his state's government. All political power is inherent in the people of Texas, whose government is founded on their authority and maintained for their benefit. * * * Section 2 of Article I (i. e., the State Constitution) further pledges the faith of the people of Texas to the preservation of a republican form of government, and declares that 'subject to this limitation only, they (the people) have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient.' The primary laws of this State are based upon a recognition of political parties as agencies of the people for the exercise of the powers thus reserved to them by the constitution. It necessarily follows as a part of the right of the people to organize political parties for the constitutional purposes stated that the people of the state have the power, through their Legislature, to enact laws having for

> their purpose the protection of the constitutional rights, declared in the provision just quoted. * * * " (p. 521).

Briscoe v. *Boyle,* 286 S. W. 275 (Tex. Civ. App., 1926), involved the old Article 3107 prior to declaration by this Court in *Nixon* v. *Herndon* that that article was unconstitutional. The question of the inherent power of the political parties to determine their membership was there squarely raised and decided. A county Democratic executive committee adopted a resolution excluding from primary elections all those who had voted against any Democratic gubernatorial nominee at the last election. Fourteen such persons brought suit against the judges of election to enjoin them from enforcing the resolution. The injunction was denied in the lower court, but on appeal the decree was reversed and the injunction granted. The Texas Court of Civil Appeals considered at length the legislative situation with respect to primary elections and held that since the State of Texas had legislated in detail concerning the qualifications of voters in such elections, political parties themselves no longer have any power to prescribe qualifications not made under authority of statute. The Court said:

> "By excluding negroes from participating in party primary elections, and by legislating upon the subject of the character and degree of party fealty required of voters participating in such elections, the Legislature has assumed control of that subject to the exclusion of party action, thus depriving the party of any power to alter, restrict or enlarge the test of the right of the voter to participate in party primaries" (p. 276).

The Court also said:

> "But the Legislature has taken possession and control of the machinery of the political parties of the state, and, while it permits the parties to operate that machinery they do so only in somewhat strict accordance with the rules and regulations laid down in minute and cumbersome detail by the legislative body" (p. 276).

Briscoe v. *Boyle* is especially interesting from the historical point of view because it indicates that whatever power political parties may once have had to determine their membership, the state had absorbed this power and exercised it by the Act of 1923 and had itself determined the eligibility of participants in the Democratic primary elections. Chapter 67 of 1927 in no way surrendered this power. While it authorized the state executive committee to prescribe the qualifications of party members, this was a limited authority in that it prohibited the party from denying anyone the right to participate in a primary because of former political views or affiliations (the question involved in *Love* v. *Wilcox*) and also forbade the parties to discriminate against qualified voters because of their membership or non-membership in organizations other than a political party. In other words, the fact of membership or non-membership in the Klu Klux Klan or a benevolent order or a church could not affect the right to vote. It is clear that the Legislature had no intention, even if it had the right, to abandon its jurisdiction over the primaries of the state.

It follows that the defects of the Act of 1923 are equally inherent in the Act of 1927 as elaborated by the resolution of the Democratic State Executive Committee and that the Act of 1927 as so amplified deprived the petitioner of the equal protection of the laws guaranteed to him by the Fourteenth Amendment and of the right to vote guaranteed to him by the Fifteenth Amendment. The decision of this Court in *Nixon* v. *Herndon* is, therefore, applicable and the Circuit Court of Appeals erred in failing to apply that decision to this case.

Mention must also be made of *Love* v. *Griffith*, 266 U. S. 32. There the plaintiffs as qualified electors sought to enjoin as violative of the Constitution the enforcement of a rule made by the Democratic City Executive Committee of Houston, Texas, that Negroes should not be allowed to vote at a particular Democratic primary election. The bill was denied and the plaintiffs appealed to the Court of

Civil Appeals, which held that at the date of its decision, months after the election, the cause of action had ceased to exist and that the appeal would not be entertained on the question of costs alone. On error to this Court, Mr. Justice Holmes said, page 34:

> "If the case stood here as it stood before the court of first instance it would present a grave question of constitutional law and we should be astute to avoid hindrances in the way of taking it up. But that is not the situation. The rule promulgated by the Democratic Executive Committee was for a single election only that had taken place long before the decision of the Appellate Court. No constitutional rights of the plaintiffs in error were infringed by holding that the cause of action had ceased to exist. The bill was for an injunction that could not be granted at that time. There was no constitutional obligation to extend the remedy beyond what was prayed."

The "grave question of constitutional law," which this Court could not consider in *Love* v. *Griffith*, because in that instance time had made the issue moot, has become the vital point of conflict in the present suit.

B.—THE RESPONDENTS IN REFUSING TO PERMIT THE PETITIONER TO VOTE WERE ACTING IN THEIR OFFICIAL CAPACITIES AS STATE OFFICERS, BECAUSE THEY WERE APPLYING STATE POWERS TO A PUBLIC PURPOSE. UNDER DOCTRINE OF HOME TEL. & TEL. CO. V. LOS ANGELES THEIR CONDUCT VIOLATED THE CONSTITUTIONAL RIGHTS OF THE PETITIONER IRRESPECTIVE OF THE VALIDITY OF CHAPTER 67 OF THE LAWS OF 1927.

If Chapter 67 of the Laws of 1927 has delegated to the party executive committee the power to exclude Negroes from primary elections, the action of the party executive committee is then the action of the state, as we have shown, *supra*, and the statute to that extent is consequently unconstitutional. If, however, the statute is not deemed to

have delegated the power to exclude Negroes, it would not be unconstitutional; and in that event if the suit were here brought against the party executive committee it might have been a defense that the party executive committee had inherent power to exclude Negroes from voting at primaries. But just as the question here presented does not involve the determination that political parties are for all purposes agencies of the state, so it is unimportant whether political parties have for some purposes inherent power to prescribe the terms of party membership.

This action is not against the party executive committee. It is brought against the judges of election, who—whether they be deemed state officials, party officials or the representatives of the contending candidates who contribute to their remuneration—are clothed with the power to act in the capacity of judges of election at primary elections by the state itself. **Though their designation may come from the party, their powers flow from the state alone and their function as judges of election is to accomplish a state purpose.**

Powers Vested in Judges of Election.

It has already been shown that the Legislature has with meticulous care provided for the time, place and manner of holding primary elections and of determining and contesting the results (*supra*, p. 20). Among the statutory provisions are a number dealing with judges of elections. Their title, position, status, method of appointment, powers and duties are all created and prescribed by law (1925 Tex. Rev. Civ. Stats., Elections, Arts. 3102 *et seq.*). They are thus required to take an oath faithfully to perform their "duty as officer of the election" (Arts. 2998, 3104). They are employed to keep the peace at the primary election, to enforce the anti-loitering law, to make arrests, to administer oaths and conduct examinations thereunder in order to determine the qualifications of voters (Art. 3105).

Article 3105 of the Election Law reads:

> "Judges of primary elections have the authority, and it shall be their duty, to administer oaths, to preserve order at the election, to appoint special officers to enforce the observance of order and to make arrests, as judges of general elections are authorized and required to do. Such judges and officers shall compel the observance of the law that prohibits loitering or electioneering within one hundred feet of the entrance of the polling place, and shall arrest, or cause to be arrested, anyone engaged in the work of conveying voters to the polls in carriages or other mode of conveyance, except as permitted by this title."

The power "to administer oaths * * * as judges of general elections are authorized and required to do" embraces above all a power to administer such oaths for the purposes of ascertaining the qualifications of a challenged voter. They are thus imbued with the power to determine who is duly qualified as an elector as well as to keep the peace and "to appoint special officers to enforce the observance of order and to make arrests, as judges of general elections are authorized and required to do."

And thus it appears that even if these respondents be not state officers in the same category and to the same extent as the Governor or the Attorney General of the state, they are, nevertheless, quasi-public officials receiving the definition of their duties and the badge of their authority from the statutes of the state; and the Legislature has by its own edict given to judges of primary elections the powers and duties of judges of general elections (Art. 3105, *supra*).

It requires no further extended argument to demonstrate that the conduct of primary elections is, when authorized by statute, a state function pointed to achieving a fair expression of popular, sovereign will (*Love* v. *Wilcox, supra*), and that the judges of election acting in their capacities as judges of primary elections are fulfilling a state purpose (see discussion *supra*, pp. 25-27).

Acts of Respondents Attributable to State.

If, therefore, these judges of election have abused their state powers and have used them "as the instrument for doing wrongs," their actions are attributable to the state itself. This is clear from a reading of

Home Tel. & Tel. Co. v. *Los Angeles*, 227 U. S. 278;
Standard Scale Co. v. *Farrell, supra;*
King Manufacturing Co. v. *Augusta, supra.*

Home Tel. & Tel. Co. v. *Los Angeles* involved the validity of an ordinance of the City of Los Angeles establishing telephone rates which it was claimed were confiscatory and in violation of the due process clause of the Fourteenth Amendment. The question there was whether in the absence of the final decision by a State Court holding the rates in question to be proper, there could be said to have been such state action by reason of the ordinance alone as would bring the Fourteenth Amendment into play and give the Federal Courts jurisdiction. Mr. Chief Justice White, writing for this Court, said at page 286:

> "* * * the provisions of the Amendment as conclusively fixed by previous decisions are generic in their terms, are addressed, of course, to the States, but also to *every person whether natural or juridical who is the repository of state power.* By this construction the reach of the Amendment is shown to be coextensive with any exercise by a State of power, in whatever form exerted." (Italics ours.)

The emphasis in the *Home Tel. & Tel.* case is placed, not upon the official title of the actor, but upon the vesting in him of state power, viz., power granted by the state devoted to a state purpose. This is made clear from further quotations from the opinion of Mr. Chief Justice

White at pages 287 *et seq.*, where he says, speaking of the Fourteenth Amendment:

> "It provides, therefore, for a case where one who is in possession of state power uses that power to the doing of the wrongs which the Amendment forbids even although the consummation of the wrong may not be within the powers possessed if the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrongdoer. That is to say, the theory of the Amendment is that where an officer or other representative of a State in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the State has authorized the wrong is irrelevant and the Federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power."

It was then pointed out that the amendment, in looking to the enforcement of rights which it guaranteed and to the prevention of wrongs which it prohibited, did not proceed only upon the assumption that states acting in their governmental capacities "in a complete sense" may violate the provisions of the amendment, but "which was more normally to be contemplated, that state powers might be abused by those who possessed them and as a result might be used as the instrument for doing wrongs" and that the amendment provided against this contingency. And again, at page 288, he said:

> "Under these circumstances it may not be doubted that where a state officer under an assertion of power from the State is doing an act which could only be done upon the predicate that there was such power, the inquiry as to the repugnancy of the act to the Fourteenth Amendment cannot be avoided by insisting that there is a want of power. * * * To repeat, for the purpose of enforcing the rights guaranteed by the Amendment when it is alleged that a state officer in virtue of state power is doing an act which if permitted to be done *prima*

facie would violate the Amendment, *the subject must be tested by assuming that the officer possessed power if the act be one which there would not be opportunity to perform but for the possession of some state authority.*" (Italics ours.)

Applying that test to this case, it is clear that the respondents would not have had the opportunity to refuse to permit the petitioner to vote in the Democratic Party primary election if they had not become possessed of the power to act as judges of election through act of the Legislature of the state.

It is suggested in the opinion of the District Court (R. 34), and again in the opinion of the Circuit Court of Appeals (R. 42), that in view of the fact that the respondents were paid for the services which they rendered as judges of election out of a fund derived from contributions by the participating candidates, they could not be acting as officers of the State of Texas. The source of remuneration is never determinative as to the status or official capacity of a person. There is no end of cases sustaining this proposition.* See:

Tumey v. *Ohio*, 273 U. S. 510;
Kimbrough v. *Barnett*, 93 Tex. 301, 55 S. W. 120;
Hendricks v. *The State*, 20 Tex. Civ. App. 178, 49 S. W. 705;
Willis v. *Owen*, 43 Tex. 41;
Lincoln v. *Hapgood*, 11 Mass. 350.

If, therefore, these judges of election have abused their powers derived from the state and have used them "as the instrument for doing wrong," their actions are state actions. The classification by reason of color is forbidden to the state by the Fourteenth and Fifteenth Amendments and this prohibition is controlling not only in so far as the legislative action is concerned, but also applies to anyone acting under authority lodged in him by the state.

* Cases are collected in exhaustive note in 53 A. L. R. 595.

We then have the situation of a deprivation of the plaintiff's right not to be discriminated against at the polls by reason of his color; we have a lack of justification; and we have the fact that this unjustified deprivation was made possible only by the patent of authority with which the state has invested these respondents.

II.

The decision of the Circuit Court of Appeals in this case is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *Bliley* v. *West*.

Bliley v. *West*, 42 Fed. (2nd) 101, arose out of a similar effort by the State of Virginia to disenfranchise Negroes in the primary elections. There the statute described voters as "all persons qualified to vote at the election for which the primary is held, and not disqualified by reason of other requirements in the law of the party to which he belongs." The Democratic State Convention of 1924 in Virginia adopted a resolution declaring that only white persons should participate in the Democratic primary. The action was brought for damages against the judges of election who set up this resolution as a justification. Defendants demurred and the District Court overruled the demurrer with an opinion written by Judge Groner, 33 Fed. (2nd) 177. The case went to trial; upon appeal from the final judgment in favor of the plaintiff, the Circuit Court of Appeals for the Fourth Circuit, 42 Fed. (2nd) 101, affirmed the judgment, adopting the opinion of Judge Groner as its own.

After citing the case of *Commonwealth* v. *Willcox*, 111 Va. 849, at p. 859, in which the Court held that a primary once adopted by a political party becomes and constitutes a necessary part of the election machinery and "fulfils an essential function in the plea to promote honesty in the conduct of elections—elections which shall faithfully re-

flect and register the unbought will of the electors," Judge Groner said as follows, at page 180:

> "The statute of Virginia, unlike that of Texas, does not in terms exclude the negro, but gives to the party participating the right to do so.* The result is the same. The Legislature, pursuant to constitutional authority, having undertaken to regulate primary elections and to authorize them to be held at the public expense and to provide the same rules and regulations applicable to an election, may not indirectly, any more than it may directly, exclude a duly qualified voter who declares himself to be an adherent to the party participating in the primary from the exercise of his right of suffrage. The Fourteenth Amendment compels the adoption of what is called impartial suffrage. Its purpose was to establish all over the United States one people, and that each of these may understand the constitutional fact that his privileges and immunities cannot be abridged by state authority, and that these rights are not confined to any class or race but comprehend all within its scope. The General Assembly of Virginia having provided the primary as a method (though optional) for the nomination of candidates, and the Supreme Court of Virginia having declared it when adopted an inseparable part of the election machinery, it would seem to me necessarily to follow that the legislature cannot by delegation or otherwise give vitality to a claimed right which it is itself prohibited by the Constitution from enacting into law."

Compare this noble language with the narrow construction of the Constitution by the Circuit Court of Appeals in this case. Bryan, C. J., said (R. 42):

> "Each political party is represented by its own election officials who have nothing to do with conducting the primary of any other party. In these particulars the primary election law of Texas differs radically from that of Virginia where the State conducts and pays the expense of holding the pri-

* This refers to the old Section 3107 considered in *Nixon* v. *Herndon*, *supra*.

> mary for all political parties just as it does in the general election. West v. Bliley, 33 F. (2) 177, affirmed by the Circuit Court of Appeals for the Fourth Circuit in 42 F. (2) 101, cannot therefore in our opinion be relied on as authority in this case."

We have already discussed *supra,* page 33, the irrelevance of the argument that there is a categorical difference between cases in which the state pays the primary expenses and one in which the candidates do. This factor was the sole difference between this case and *West* v. *Bliley.* As the situation now stands, Negroes may not be deprived of the vote at primaries conducted in the Fourth Circuit, but they can be excluded in the Fifth Circuit. This discrepancy should be removed by this Court.

III.

The action of the respondents was in violation of Section 31 of Title 8 of the United States Code.

Section 31 of Title 8 of the United States Code has been discussed *supra,* page 15, under the question of jurisdiction. The section provides that all citizens otherwise qualified to vote at any election by the people in any state shall be entitled and allowed to vote at all such elections without distinction on the ground of color, any local law, custom, usage or regulation to the contrary notwithstanding.

The primary election in which the petitioner was denied participation was *inter alia* for the nomination of candidates for representatives to Congress and for United States Senator. There were six candidates for the nomination for Senator and two candidates for the nomination of representative to Congress (R. 2). The petitioner was denied the right to vote because of his color (R. 4). It follows that the action of the respondents violated this Federal statute, to the petitioner's injury. Even if the opinion of the District Court and the Circuit Court of Appeals could be sustained with respect to state officers on the ground

of the inherent power of political parties to make discriminatory regulations with respect to participants in the primary elections, this argument could have no bearing upon the case in the face of this express act of Congress.

Wiley v. *Sinkler, supra;*
Swafford v. *Templeton, supra.*

In this connection it may be pointed out that *Newberry* v. *United States*, 256 U. S. 232, is irrelevant. That case involved the power of Congress to limit the amount of money which a candidate for United States Senator might contribute or procure for his nomination or election. Decided by a divided Court, the case turned upon the interpretation of the authority granted to Congress over the election of its members by Article I, Section 4 of the Constitution. It did not deal with the question of "the right to vote" and the power of Congress to enforce that right as granted by the Fourteenth and Fifteenth Amendments.

IV.

This Court should assume jurisdiction of this case by writ of certiorari because of the importance of the question raised.

The courts of Texas have taken judicial notice of the fact that for all practical purposes, and certainly in so far as state elections are concerned, there is only one political party, and that the real political battles of the state are not those held at the general election, but those waged for nomination at the Democratic primaries. So, in the case of *State ex rel. Moore* v. *Meharg*, 287 S. W. 670, decided by the Court of Civil Appeals of Texas in October, 1926, the Court said:

> "Indeed, it is a matter of common knowledge in this State that a Democratic primary election held in accordance with our statutes is virtually decisive of the question as to who shall be elected at the

> general election. In other words, barring certain exceptions, a primary election is equivalent to a general election.

In an article by Meyer M. Brown, 23 Mich. L. Rev. 279, the author says:

> "In Texas, a victory in a primary, on the Democratic side, means practically certain election."

And history confirms these dicta.

If Negroes in the State of Texas may not vote at Democratic primaries, they are then in a practical manner deprived of their franchise. It is idle to urge that they can participate in other party primaries, for the election of Republican Presidential Electors in 1928 stands out as unique in the political history of the State of Texas. Moreover, under Chapter 67 of the Laws of 1927, the Republican Party can similarly bar Negroes from its primaries and caucuses. The law applies to all parties.

The real question, then, is this: Shall the constitutional right to partake of the basic institution under a republican form of government be denied to a large part of the population by reason of color alone?

This Court cannot accept Chapter 67 of the Laws of 1927 of Texas at its face value, but must go further and examine what has been accomplished behind its bland exterior. In the words of Mr. Justice Matthews in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

If the decision of the Circuit Court of Appeals prevails, then the Fourteenth Amendment as vitalized by *Nixon* v.

Herndon and *West* v. *Bliley*, and the Fifteenth Amendment as interpreted in *Guinn* v. *United States*, 238 U. S. 347, will have been effectively nullified.

The "grave question of constitutional law" referred to by Mr. Justice Holmes in *Love* v. *Griffith*, *supra*, which arose under this very statute, is now for the first time presented to this Court. Your petitioner is confident that this Court again, in the language of Mr. Justice Holmes in that case, will "be astute to avoid hindrances in the way of taking it up."

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1931

No. 265

L. A. NIXON,
Petitioner,

against

JAMES CONDON and C. H. KOLLE,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITIONER'S POINTS.

JAMES MARSHALL,
NATHAN R. MARGOLD,
ARTHUR B. SPINGARN,
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SUBJECT INDEX.

PAGE

Preliminary Statement 1
The Petition 2
The Resolution in Question 3
The Statute in Question 3
Grounds of Demurrer 6
The Decision of the District Court 6
The Decision of the Circuit Court of Appeals 7
Jurisdiction 8
Summary of Petitioner's Argument 13

POINT I—The interest protected in *Nixon* v. *Herndon* was the right to vote in a primary and is the same interest invaded here, and the classification rejected by that case was based on race and color and is the same classification applied here. The only question before this Court is whether the invasion of this interest and this classification were the result of State action 15-17

POINT II—The petitioner in being deprived of the right to vote at a primary because of his color was denied the equal protection of the laws by the State of Texas, in violation of the Fourteenth Amendment 18-44

A. The power of respondents to deny petitioner's right to vote at the primary election was derived from the resolution of the State Democratic Executive Committee adopted pursuant to authority granted by Chapter 67 of the Laws of 1927. Both the statute and the resolution adopted thereunder violated the Fourteenth Amendment because

PAGE

they authorized and worked a classification based on color.....18-28

Legislative Intention 18

The "Inherent Power" Argument..... 21

"Recognition" of Power Argument..... 26

B. Even if the Democratic State Executive Committee in adopting the resolution restricting voting at Democratic primaries to "white" Democrats exceeded the powers delegated to it by the Legislature in Chapter 67 of the Laws of 1927, its action, though *ultra vires,* constituted State action in violation of the Fourteenth Amendment because it authorized and worked a classification based on color.....28-31

C. The Democratic State Executive Committee, acting in relation to primary elections, was part of the governmental machinery of the State. The resolution of that committee restricting voting in Democratic primaries to "white" Democrats was State action and violated the Fourteenth Amendment and afforded respondents no justification in denying to petitioner the right to vote.....31-35

D. Respondents by reason of their office as judges of election derived their power to deny the petitioner the right to vote at the primary election from the statutes of the State. In applying that power to a State purpose in such a way as to work a color classification they violated the Fourteenth Amendment, irrespective of Chapter 67 of the Laws of 1927 and the resolution of the Democratic State Executive Committee.....35-44

Authority Vested in Judges of Election.. 36

Consequences of Abuse of Powers..... 39

Expenses of Primaries..... 43

PAGE

POINT III—The right of petitioner to vote in the primary regardless of race or color was denied and abridged by the State of Texas, in violation of the Fifteenth Amendment.....45-55

A Primary Vote is a Vote..... 45

Fifteenth Amendment Like Nineteenth..... 48

Historical Error..... 49

The Newberry and Other Cases Distinguished.. 50

Petitioner's Right to Vote Abridged Even if Not Denied..... 53

POINT IV—Conclusion.....55-56

TABLE OF CASES.

PAGE

Anderson v. Ashe, 62 Tex. Civ. App. 262..... 52
Ashford v. Goodwin, 103 Tex. 491..... 52

Bailey v. Alabama, 219 U. S. 219..... 18
Binderup v. Pathe Exchange, 263 U. S. 291..... 12
Bliley v. West (Circuit Ct.), 42 F. (2d) 101....8, 32, 56
Bliley v. West (District Ct.), 33 F. (2d) 177..... 8
Briscoe v. Boyle, 286 S. W. 275 (Tex. Civ. App.)...
23, 25, 26, 27, 32, 33, 48

Child Labor Tax Case, 259 U. S. 20..... 18
Clancy v. Clough (Tex.), 30 S. W. (2d) 569....27, 33, 43
Commonwealth v. Rogers, 63 N. E. Rep. 421 (Mass.) 48
Commonwealth v. Willcox, 111 Va. 849..... 32

Ex parte Yarbrough, 110 U. S. 651..... 49
Fidelity & Deposit Co. v. Tafoya, 270 U. S. 426..... 28
Ford v. Surget, 97 U. S. 594..... 34
Friberg v. Scurry (Tex.), 33 S. W. (2d) 76..... 27

General Investment Co. v. N. Y. Central R. R., 271
U. S. 228..... 12
Guinn v. United States, 238 U. S. 347..... 21

Hammer v. Dagenhart, 247 U. S. 251..... 18
Hendricks v. The State, 20 Tex. Civ. App. 178, 49
S. W. 705..... 43
Home Tel. & Tel. Co. v. Los Angeles, 227 U. S. 278..
14, 27, 28, 29, 31, 34, 35, 40
Hunt v. Reese, 92 U. S. 214..... 46

Kimbrough v. Barnett, 93 Tex. 301, 55 S. W. 120.... 43
King Mfg. Co. v. Augusta, 277 U. S. 100..... 34
Koy v. Schneider, 110 Tex. 369.....52, 54

PAGE

Lincoln v. Hapgood, 11 Mass. 350..... 43
Lindgren v. United States, 281 U. S. 38..... 22
Love v. Griffith, 266 U. S. 32.....8, 10, 11
Love v. Taylor (Tex.), 8 S. W. (2d) 795..... 27
Love v. Wilcox, 28 S. W. (2d) 515, 119 Tex. 256....
19, 24, 26, 30, 31, 33

Moore v. Meharg, 287 S. W. 670 (Tex. Civ. App.)...34, 53
Myers v. Anderson, 238 U. S. 368.....8, 21

Neal v. Delaware, 103 U. S. 370..... 49
Newberry v. United States, 256 U. S. 232....14, 50, 51, 54
Nixon v. Condon (District Ct.), 34 F. (2d) 464.... 1, 6
Nixon v. Condon (Circuit Ct.), 49 F. (2d) 1012.... 1, 7
Nixon v. Herndon, 273 U. S. 536....4, 8, 13, 15, 16, 17, 45

Raymond v. Chicago Traction Co., 207 U. S. 20..... 28
Robinson v. Holman, 181 Ark. 428; appeal dis., cert.
denied, 282 U. S. 805.....11, 56

Standard Scale Co. v. Farrell, 249 U. S. 571..... 34
Swafford v. Templeton, 185 U. S. 487..... 8

Tumey v. Ohio, 273 U. S. 510..... 43

Waples v. Marrast, 108 Tex. 5, 184 S. W. 180..... 34
Ward v. Love County, 253 U. S. 17..... 8
Westerman v. Mimms, 220 S. W. 178 (Tex.)..... 48
White v. Lubbock, 30 S. W. (2d) 72 (Tex. Civ. App.) 27
Wiley v. Sinkler, 179 U. S. 58..... 8
Williams v. Bruffy, 96 U. S. 176..... 34
Willis v. Owen, 43 Tex. 41..... 43

Yarbrough, Ex parte, 110 U. S. 651..... 49
Yick Wo v. Hopkins, 118 U. S. 356.....14, 20, 29, 41

TEXTS, LAW REVIEW ARTICLES, ETC.

PAGE

American Law Reports, 53: 595 43
Bouvier's Law Dictionary 46
Brown, Primary Disenfranchisement of the Negro, 23 Mich. Law Rev. 279 ..... 32, 53
Cornell Law Quarterly, 15: 267 43
Funk & Wagnall's Standard Dictionary 46
Harvard Law Review, 43: 467 23
Merriam & Overacker, Primary Elections (1928 Edition) 32, 49
Michigan Law Review, 23: 279 ..... 32, 53
Minnesota Law Review, 12: 321, 470 ..... 22, 49
Sargent, Law of Primary Elections, 12 Minn. Law Rev. 321, 470 ..... 22, 49
Union League Club of Philadelphia, Essays on Politics, 1868 49
University of Pennsylvania Law Review, 72: 222 43
World Almanac 53
Yale Law Journal, 39: 423 23

PROVISIONS OF CONSTITUTION.

Fourteenth Amendment 5, 8, 13, 14, 16, 29, 41, 56
Fifteenth Amendment 5, 6, 8, 14, 16, 29, 45, 53, 56
Nineteenth Amendment 48
Article I, Section IV 50, 51

FEDERAL STATUTES.

Judicial Code:
Section 24—
(1) 5
(11) 5, 9
(12) 5, 12
(14) 5, 12
Revised Statutes ....

FEDERAL STATUTES (continued) PAGE

United States Code:
Title 8—
Section 31.....6, 8, 10, 14, 46
Section 43..... 10
Title 28, Section 41—
(1)..... 5
(11)..... 5, 9
(12).....5, 12
(14).....5, 12

TEXAS STATUTES.

Laws of 1927, Chapter 67 (present Art. 3107, Rev. Civ. Stat.).....2, 3, 4, 16, 18-31, 55
Penal Code of 1925:
Title Six, Chapter 4—
Article 217..... 38
Article 218..... 38
Article 231..... 38
Article 236.....46, 47
Article 241..... 47
Generally.....38, 47, 48
Revised Civil Statutes of 1925:
Elections, Chapter 8—
Article 2954..... 37
Article 2955..... 38
Elections, Chapter 13—
Articles 3006-3007.....36, 37
Article 3093-a (former Art. 3107).....4, 15
Article 3104..... 36
Article 3107 (Chap. 67 of Laws of 1927).....
2, 3, 4, 16, 18-31, 55
Article 3110.....22, 33, 48
Article 3121..... 47
Generally.....33, 36
Resolution of Democratic State Executive Committee.....2, 3, 16, 18-35, 39, 40, 55

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 265.

L. A. NIXON,
Petitioner,

against

JAMES CONDON and C. H. KOLLE,
Respondents.

PETITIONER'S POINTS.

Preliminary Statement.

This case comes before this Court on writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, granted October 19, 1931 (R. 31), to review a judgment entered in that court on May 16, 1931 (R. 30-31), which affirmed a judgment of the United States District Court for the Western District of Texas, filed July 31, 1929, dismissing the petition (R. 10).

The opinion of the District Court is printed in the record at pages 15-27 and reported 34 F. (2d) 464.

The opinion of the Circuit Court of Appeals is printed in the record at pages 28-30 and reported 49 F. (2d) 1012.

The petitioner, a citizen of the United States and of the State of Texas, brought this action in the United States

District Court for the Western District of Texas against the respondents, who were judges of election in Precinct No. 9, El Paso County, Texas, to redress an injury which he sustained by reason of the acts of the respondents in their official capacities (R. 1).

The Petition.

The petitioner is a Negro. He was a bona fide member of the Democratic Party of the State of Texas and in every respect was entitled to participate in elections held within that State, whether for the nomination of candidates for office or otherwise (R. 2-3).

On July 28, 1928, a Democratic primary was held in the State of Texas to select candidates, not only for State officers, but also for United States Senator and Congressmen (R. 1-2). On that day the petitioner presented himself at the polls and offered to take the pledge to support the nominees of the Democratic primary election held on that day and to comply in every respect with the valid requirements of the laws of Texas, save as they violated the privileges conferred upon and guaranteed to him by the Constitution and laws of the United States. He requested the respondents to supply him with a ballot and permit him to vote at the Democratic primary election held on that day and the respondents refused to permit the petitioner to vote or to furnish him with a ballot and stated as the reason that under instructions from the Democratic county chairman, pursuant to resolution of the State Democratic Executive Committee, adopted under the authority of Chapter 67 of the Laws of 1927 of Texas, only *white* Democrats were allowed to participate in the Democratic primary then being held (R. 2-3). *The respondents ruled that the petitioner was not entitled to vote in the Democratic primary because he was a Negro* (R. 3, 5). The resolution of the State Democratic Executive Committee of Texas, under the terms of which respondents purported to act, reads as follows (R. 3):

The Resolution in Question.

"RESOLVED: That all white Democrats who are qualified under the Constitution and laws of Texas and who subscribe to the statutory pledge provided in Article 3110, Revised Civil Statutes of Texas, and none other, be allowed to participate in the primary elections to be held July 28, 1928, and August 25, 1928, and further, that the Chairman and secretary of the State Democratic Executive Committee be directed to forward to each Democratic County Chairman in Texas a copy of this resolution for observance." (Black type ours.)

The statute under the authority of which the Democratic State Executive Committee adopted this resolution, Chapter 67 of the Laws of 1927, First Called Session (Article 3107, Chapter 13 of the Revised Civil Statutes of Texas), gave authority to the State Executive Committee to prescribe qualifications of party members and determine who shall be qualified to vote or participate in such political party. The statute was passed as an "emergency" measure, because, as the statute itself proclaims, "the fact that the Supreme Court of the United States has recently held Article 3107 invalid, creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each House be suspended * * *" (R. 4-5).

The Statute in Question.

"AUTHORIZING POLITICAL PARTIES THROUGH STATE EXECUTIVE COMMITTEES TO PRESCRIBE QUALIFICATIONS OF THEIR MEMBERS.

(H. B. No. 57)

CHAPTER 67.

An Act to repeal Article 3107 of Chapter 13 of the Revised Civil Statutes of Texas, and substituting in its place a new article providing that every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be quali-

fied to vote or otherwise participate in such political party, and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. That Article 3107 of Chapter 13 of the Revised Civil Statutes of Texas be and the same is hereby repealed and a new article is hereby enacted so as to hereafter read as follows:

'ARTICLE 3107. Every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party; provided that no person shall ever be denied the right to participate in a primary in this State because of former political views or affiliations or because of membership or non-membership in organizations other than the political party.'

SEC. 2. The fact that the Supreme Court of the United States has recently held Article 3107 invalid, creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended and said rule is hereby suspended, and that this Act shall take effect and be in force from and after its passage, and it is so enacted.

Approved June 7, 1927.

Effective 90 days after adjournment."

The decision of this Court which was referred to by the Texas Legislature was the case of *Nixon* v. *Herndon*, 273 U. S. 536, which held unconstitutional a statute of the State of Texas which expressly prohibited Negroes from participating in Democratic primary elections held in that State.* It is alleged in the petition (and the history of

* The statute involved in *Nixon* v. *Herndon*, i.e., the old Article 3107:

"Article 3093a. All qualified voters under the laws and constitution of the State of Texas who are bona fide members of the democratic party shall be eligible to participate in any democratic party primary election, provided such voter complies with all laws and rules governing party primary elections; however, in no event shall a *negro* be eligible to participate in a democratic party primary election held in the State of Texas, and should a *negro* vote in a democratic primary election, such ballot shall be void and election officials are hereby directed to throw out such ballot and not count the same." (Italics ours.)

the Act sustains the allegation) that Chapter 67 of the Laws of 1927 was an attempt to evade the decision of this Court in *Nixon* v. *Herndon* and to provide, by delegation to the party Executive Committee, the disfranchisement of Negroes which this Court held could not be done by direct action of the Legislature (R. 5-6).

The petition also alleges that at the time of the passage of Chapter 67 of the Laws of 1927 of Texas the Democratic Party was the only political party in the State which held a primary election and that the statute, when it referred to the State Executive Committee, was enacted for the purpose of preventing the petitioner and other Negroes who were members of the Democratic Party from participating in Democratic primary elections (R. 6). Furthermore, the petition sets forth that there are many thousands colored Democratic voters in the State of Texas situated as is the petitioner; that Texas is a State which is normally so overwhelmingly Democratic that nomination on the Democratic ticket is equivalent to election, and that the only real contest at the polls is that in the Democratic primaries. And, finally, it is alleged that the acts of the respondents in denying the petitioner the right to vote at the Democratic primary in question were wrongful, unlawful and without constitutional warrant and deprived him of valuable political rights, to his damage in the sum of $5,000 (R. 7-8).

This suit was brought under Section 41 of Title 28 of the United States Code, subdivisions 1, 11, 12 and 14 being applicable.

Judgment is demanded against the respondents (a) because Chapter 67 of the Laws of 1927 of Texas and the resolution of the Democratic State Executive Committee thereunder denied the petitioner the equal protection of the laws of Texas, in violation of the Fourteenth Amendment to the Constitution of the United States; (b) because the petitioner's right to vote at the primary election was denied and abridged by the resolution of the Democratic State Executive Committee and the action of the Legislature of Texas on account of his race and color, in viola-

tion of the Fifteenth Amendment to the Constitution; (c) because the resolution and statute in question are contrary to Section 31 of Title 8 of the United States Code; and (d) because the respondents, acting under a delegation of State power, violated those sections of the Constitution and that Act of Congress when they denied the petitioner the right to vote on the ground that he is a Negro (R. 6-7).

Grounds of Demurrer.

The respondents made a motion to dismiss. In addition to controverting the allegations of the petition with respect to the constitutionality of the statute and the proceedings it was urged that the subject-matter of the suit is political and that the Court was without jurisdiction to determine the issues or to award the relief prayed for; that the allegations of the petition were not sufficient to constitute a cause of action; that irrespective of statutory authority, the State Executive Committee of a political party had authority to determine who should comprise its membership. The motion also put into issue the allegation that the petitioner was a Democrat (R. 8-10). The last ground presents an issue of fact which could not be determined on a motion addressed to the pleadings.

The Decision of the District Court.

Honorable Charles A. Boynton, District Judge, who heard the motion, granted the motion to dismiss in an opinion (R. 15-27, 34 F. [2d] 464) in which he said: (1) that the Fourteenth and Fifteenth Amendments to the Constitution of the United States cannot be violated except by some action properly to be characterized as State action; (2) that Chapter 67 of the Laws of 1927 on its face directs no action in violation of the Federal Constitution; (3) that the action of the State Democratic Committee and the judges of election, complained of in the

petition, was not State action, because (a) the members of the committee and the judges of election were not paid by the State, and so were not like the persons officiating at the Illinois and Virginia primaries, who have been held liable in damage to qualified citizens to whom they denied the right to vote; (b) they were not officers of the State; (c) they were acting only as private representatives of the Democratic political Party, and (d) the members of the Democratic Party possess inherent power to prescribe the qualifications of those who may vote at its primaries, irrespective of and without reference to Chapter 67 of the Laws of 1927; and (4) that a primary election is not an election within the meaning of the Fifteenth Amendment, because (a) a political party is not a governmental agency, and (b) at the time the Thirteenth, Fourteenth and Fifteenth Amendments were adopted, primary elections were unknown and therefore may not be held to be covered by these Amendments.

The Decision of the Circuit Court of Appeals.

The Circuit Court of Appeals, in affirming the District Court, rendered an opinion by Bryan, C.J. (R. 28-30; 49 F. (2d) 1012), which held as follows: (1) that the Fourteenth and Fifteenth Amendments apply to State action, not to action of private individuals or associations; (2) that this case differs from *Nixon* v. *Herndon,* because there the element of State action was supplied by the enactment of a statute which expressly discriminated against Negroes, whereas here the statute merely recognized an existing power on the part of the Democratic State Executive Committee to fix the qualifications of its members; (3) that the election officials who rejected the petitioner were appointed by the Democratic State Executive Committee, and were not paid by the State, and (4) that the decision in *West* v. *Bliley* is distinguishable because there the State of Virginia conducted the primary and paid the

expenses thereof, whereas in Texas the State merely regulates a privately conducted primary election so as to secure a fair and honest election.

Jurisdiction.

The jurisdiction of Federal Courts over this suit is provided by Section 41, Title 28 of the United States Code (Judicial Code, Sec. 24, as amended). It is there provided, in subdivision 1, that the District Court shall have original jurisdiction over "* * * First. Of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States, or treaties, made or which shall be made, under their authority * * *."

This is a suit of a civil nature at common law for a sum in excess of $3,000 and the matter in controversy arises under (1) the Fourteenth Amendment to the Constitution of the United States; (2) the Fifteenth Amendment to the Constitution of the United States; (3) Section 31, Title 8 of the United States Code.

In similar circumstances this Court has assumed jurisdiction.

Wiley v. *Sinkler,* 179 U. S. 58, 65.
Swafford v. *Templeton,* 185 U. S. 487.
Myers v. *Anderson,* 238 U. S. 368.
Nixon v. *Herndon,* 273 U. S. 536.
Ward v. *Love County,* 253 U. S. 17, 22.
Cf. *Love* v. *Griffith,* 266 U. S. 32.

In *Bliley* v. *West,* 42 F. (2d) 101, the Circuit Court of Appeals for the Fourth Circuit affirmed the order of the District Court for the Eastern District of Virginia (33 F. (2d) 177, opinion by Groner, D.J.) overruling a de-

murrer to a petition seeking the same relief as is sought in this case. There, the Democratic State Convention, like the Democratic State Committee here, adopted a resolution that only white persons should participate in Democratic primaries, and the petitioner, a Negro, was not permitted to vote in a Democratic primary in the State of Virginia. No attempt was made to bring that case up for review by this Court.

The jurisdiction of this Court is not open to attack on the ground that the subject-matter of the suit is "political." That argument was disposed of in *Nixon* v. *Herndon, supra.**

Subdivision 11 of Section 41 of Title 28 of the Judicial Code likewise gives a basis for jurisdiction by the Federal Courts, for it authorizes suits for injuries on account of acts done under the laws of the United States *"or to enforce the right of citizens of the United States to vote in the several States."*

Subdivision 12 deals with suits concerning civil rights and gives the District Courts jurisdiction "of all suits authorized by law to be brought by any person for the recovery of damages on account of any injury to his person or property or of the deprivation of any right or privilege of a citizen of the United States by any act done in furtherance of any conspiracy mentioned in Section 47 of Title 8."

Subdivision 14 gives the Federal Courts jurisdiction "of all suits at law or in equity authorized by law to be brought by any person to redress deprivation under color of any law, statute, ordinance, regulation, custom or usage of any State or any right, privilege or immunity secured by the Constitution of the United States or of any right secured by any law of the United States providing for

*See opinion of Mr. Justice Holmes at page 540.

equal rights of citizens of the United States or of all persons within the jurisdiction of the United States."

This is a suit at law to redress the deprivation of petitioner's right to vote at a primary election in the State of Texas. The deprivation was under color of a statute of the State of Texas, to wit, Chapter 67 of the Laws of 1927, and/or under color of a resolution adopted by the State Democratic Executive Committee of Texas. The suit is not only, however, to redress the deprivation of civil rights by reason of the unconstitutional restraint upon the petitioner's right of suffrage in violation of the Fourteenth and Fifteenth Amendments, but it is also based specifically upon the violation of a Federal statute, viz., Section 31, Title 8 of the United States Code, which provides:

> "Section 31. *Race, color, or previous condition not to affect right to vote.* All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding."

Section 43 of Title 8 of the United States Code also grants a right of action for violation of the right of franchise guaranteed by Section 31, *supra.*

It should be noted in this connection that not only candidates for local office but also for United States Senator and Congressman were nominated at the primary held in Texas on July 28, 1928. (R. 2).

The authorities already cited demonstrate that in similar instances this Court has assumed jurisdiction.

In the recent case of *Love* v. *Griffith*, 266 U. S. 32, the plaintiffs as qualified electors sought to enjoin as violative of the Constitution the enforcement of a rule made by the

Democratic City Executive Committee of Houston, Texas, that Negroes should not be allowed to vote at a particular Democratic primary election. The injunction was denied and the plaintiffs appealed to the Court of Civil Appeals of Texas, which held that at the date of its decision, months after the election, the cause of action had ceased to exist and that the appeal would not be entertained on the question of costs alone. The suit was brought to this Court on writ of error and was dismissed, Mr. Justice Holmes saying at page 34:

> **"If the case stood here as it stood before the court of first instance it would present a grave question of constitutional law and we should be astute to avoid hindrances in the way of taking it up.** But that is not the situation. The rule promulgated by the Democratic Executive Committee was for a single election only that had taken place long before the decision of the Appellate Court. No constitutional rights of the plaintiffs in error were infringed by holding that the cause of action had ceased to exist. The bill was for an injunction that could not be granted at that time. There was no constitutional obligation to extend the remedy beyond what was prayed." (Black type ours.)

The "grave question of constitutional law" which this Court could not consider in *Love* v. *Griffith*, because in that instance time had made the issue moot, has become the vital point of conflict in the present suit.*

The Circuit Court of Appeals accepted jurisdiction of this cause and decided the motion to dismiss upon the merits without questioning the jurisdiction of the Federal Court (R. 28-30).

The District Court after deciding the motion on the merits evidently confused the question of jurisdiction and the question of absence of merits in the discussion in the last paragraph of the opinion (R. 27).

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* *Robinson* v. *Holman*, 181 Ark. 428, appeal dismissed and certiorari denied 282 U. S. 805, apparently on same grounds as *Love* v. *Griffith*.

This distinction between **jurisdiction** and **merits** has been clearly set forth by this Court in *Binderup* v. *Pathe Exchange,* 263 U. S. 291, at page 305,* and *General Investment Co.* v. *N. Y. Central R. R.,* 271 U. S. 228, at page 230.†

As will be seen after the case of *Nixon* v. *Herndon, supra,* has been analyzed the sole difference between that case and this one is that there the respondents denied the petitioner the right to vote at a Democratic primary because the statute specifically forbade colored people to vote in Democratic primaries, whereas in this case the same petitioner was refused the right to vote at a Democratic primary by the election officials on the ground that a resolution of the States Democratic Executive Committee, adopted pursuant to authority granted by the Legislature, prohibited Negroes from voting at Democratic primaries.

The only issue in this case is, then, the question of whether the acts of the respondents was State action. If it was State action, then Nixon v. Herndon is applicable. This is clearly a question over which this Court has jurisdiction. It presents a justiciable issue irrespective of the merits of the contention. As the full nature of this issue is demonstrated by the succeeding Points, for the sake of brevity it will not be repeated here.

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* In the *Binderup* case, Mr. Justice Sutherland said:

> "Jurisdiction is the power to decide a justiciable controversy, and includes questions of law as well as of fact. A complaint setting forth a substantial claim under a federal statute presents a case within the jurisdiction of the court as a federal court; and this jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged any more than upon the way it may decide as to the legal sufficiency of the facts proven. Its decision either way upon either question is predicated upon the existence of jurisdiction, not upon the absence of it."

† In the *General Investment Company* case, Mr. Justice Van Devanter said:

> "By jurisdiction we mean power to entertain the suit, consider the merits and render a binding decision thereon; and by merits we mean the various elements which enter into or qualify the plaintiff's right to the relief sought. There may be jurisdiction and yet an absence of merits (*The Fair* v. *Kohler Die Co.,* 228 U. S. 22, 25; *Geneva Furniture Co.* v. *Karpen,* 238 U. S. 254, 258)."
>
> * * *

We respectfully refer the Court to the ensuing argument, not only as a demonstration of the merits of the petitioner's case, but also in support of the jurisdiction of this Court.

Summary of Petitioner's Argument.*

I. The interest protected in *Nixon* v. *Herndon* was the right to vote in a primary and is the same interest invaded here, and the classification rejected by that case was based on race and color and is the same classification applied here. There was no question in *Nixon* v. *Herndon* of State action, that being implicit in the statute. That is the only open question in this case under the Fourteenth Amendment which was not disposed of in the former case.

II. The petitioner by being denied the right to vote at the primary election because of his color was denied the equal protection of the laws by the State of Texas in violation of the Fourteenth Amendment. The respondents' action was action of the State of Texas, because—

A. The power of the respondents to deny the petitioner's right to vote at the primary election was derived from the resolution of the Democratic State Executive Committee, which was adopted pursuant to the authority granted to it by Chapter 67 of the Laws of 1927. The respondents' power was consequently derived from the State and was not inherent in the party.

B. Even if the Democratic State Executive Committee in adopting the resolution restricting voting at Democratic primaries to white persons exceeded the powers delegated to it by the Legislature in Chap-

* Even if the arguments made herein were all invalid, nevertheless the petition alleges a cause of action which the State Court could not have failed to entertain without itself violating the Fourteenth Amendment, and of which the United States District Court had jurisdiction, in view of the substantial Federal questions raised and argued herein. Having full confidence in the arguments here presented, we do not wish unduly to extend this brief and shall omit elaboration of this further argument unless the Court requests otherwise.

ter 67 of the Laws of 1927, its action, though *ultra vires*, was nevertheless State action.

C. The Democratic State Executive Committee, acting in relation to primary elections, was part of the governmental machinery of the State. In adopting the resolution in question the action of the Committee was State action and the resolution could not therefore justify the denial of the petitioner's right to vote.

D. Irrespective of Chapter 67 of the Laws of 1927 of Texas and the resolution of the Democratic State Executive Committee the respondents, acting as judges of election, when they denied the petitioner the right to vote were applying to a public purpose powers with which the State had vested them, and consequently their action was State action as defined in *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U. S. 278, and *Yick Wo* v. *Hopkins*, 118 U. S. 356.

III. The respondents' denial of the petitioner's right to vote in the Democratic primary was in violation of the Fifteenth Amendment.

(A) The same arguments with respect to State action under the Fourteenth Amendment are applicable under the Fifteenth Amendment.

(B) The petitioner was both denied the right to vote and his right to vote was abridged within the meaning of the Fifteenth Amendment.

(C) The right to vote guaranteed by the Fifteenth Amendment is not the same thing as an election referred to in Article I, Section 4, of the Constitution and *Newberry* v. *United States*, 256 U. S. 232, is inapplicable.

(D) Section 31, Title 8, of the United States Code prohibits discrimination by denying the right to vote by reason of color and was violated by the action of the respondents.

I.

The interest protected in *Nixon* v. *Herndon* was the right to vote in a primary and is the same interest invaded here, and the classification rejected by that case was based on race and color and is the same classification applied here. The only question before this Court is whether the invasion of this interest and this classification were the result of State action.

As the case at bar is really a sequel to *Nixon* v. *Herndon*, 273 U. S. 536, and in all respects except one identical with that case, the determination of this question will be facilitated by a preliminary consideration of *Nixon* v. *Herndon* itself and a precise delimitation of the respects in which it is controlling here.

There Nixon, the same petitioner, brought his suit in the United States District Court for the Western District of Texas to recover the sum of $5,000 in damages from the judges of election, who, like the present respondents, had refused to permit him to vote in a Democratic primary in the State of Texas. The primary then, as in this case, was held at El Paso for the nomination of candidates on the Democratic ticket for United States Senator, for Representative to Congress and for State and local offices. Then, as in this case, the judges of election refused to permit the petitioner to vote in the Democratic party primary solely because he was a Negro.

In that case it was sought to justify this discriminatory classification based upon the petitioner's color by a Texas statute enacted in May, 1923, designated Article 3093-a (the former Art. 3107, Texas Rev. Civ. Stat.), which provided that "in no event shall a negro be eligible to participate in a Democratic party primary election held in the State of Texas," etc.

Following the decision in *Nixon* v. *Herndon* that statute was repealed and the new statute adopted.

Now the judges of election have sought to justify their discrimination against the petitioner, based as it is on his color, because of a resolution of the State Democratic Executive Committee quoted *supra,* page 3, which was adopted pursuant to Chapter 67 of the Laws of 1927 and which restricts voting in Democratic primary elections to "white Democrats."

The statute of 1927 did not expressly render Negroes ineligible to vote at Democratic primaries, but empowered the State Executive Committees of such political parties as held primary elections to determine who should be qualified to vote at such primaries.*

In both cases petitioner contended that the deprivation of his right to vote was in violation of the Fourteenth and Fifteenth Amendments.

In that case, as in this case, the defendant judges of election moved to dismiss the petition on the ground that the subject-matter of the action was political, that it was not within the jurisdiction of the court, that neither the Fourteenth nor the Fifteenth Amendment nor any laws adopted pursuant thereto applied to primary elections, and that the petition failed to state a cause of action.

In *Nixon* v. *Herndon* this Court held:

> (1) that it was unnecessary to determine whether the petitioner was deprived of his right to vote within the meaning of the Fifteenth Amendment, because he had been deprived of civil rights under the Fourteenth Amendment;†

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* The Democratic Party being the only party polling over 100,000 votes in Texas was the only party required by law to hold primary elections.

† "The important question is whether the statute can be sustained. But although we state it as a question, the answer does not seem to be open to a doubt. We find it unnecessary to consider the Fifteenth Amendment, because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth. That amendment, while it applies to all, was passed, as we know, with a special intent to protect the blacks from discrimination against them" (pp. 540-541).

(2) that this deprivation of civil rights was accomplished by an arbitrary classification, viz.: one without constitutional justification;*

(3) that this classification was the result of State action;† and

(4) that consequently the Fourteenth Amendment was applicable and a common law right of action for damages lay against the offending judges of election.‡

The sole question before this Court is whether the action of the respondents as judges of election in denying the petitioner the right to vote was taken under State authority or was in effect action by the State itself. If this be so the present case will then come within the category of *Nixon* v. *Herndon* and the action of the respondents would be without constitutional justification. In that event the judgment appealed from must be reversed.

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* "The statute of Texas, in the teeth of the prohibitions referred to, assumes to forbid negroes to take part in a primary election the importance of which we have indicated, discriminating against them by the distinction of color alone" (p. 541).

† "States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case" (p. 541).

‡ "Of course the petition concerns political action but it alleges and seeks to recover for private damage. That private damage may be caused by such political action and may be recovered for in a suit at law hardly has been doubted for over two hundred years, since *Ashby* v. *White*, 2 Ld. Raym. 938, 3 *id.* 320, and has since been recognized by this Court. *Wiley* v. *Sinkler*, 179 U. S. 58, 64, 65. *Giles* v. *Harris*, 189 U. S. 475, 485. See also Judicial Code, Sec. 24 (11), (12), (14). Act of March 3, 1911, c. 231; 36 Stat. 1087, 1092. If the defendants' conduct was a wrong to the plaintiff, *the same reasons that allow a recovery for denying the plaintiff a vote at a final election allow it for denying a vote at the primary election that may determine the final result*" (p. 540, italics ours).

II.

The petitioner in being deprived of the right to vote at a primary because of his color was denied the equal protection of the laws by the State of Texas in violation of the Fourteenth Amendment.

A. The power of respondents to deny petitioner's right to vote at the primary election was derived from the resolution of the State Democratic Executive Committee adopted pursuant to authority granted by Chapter 67 of the Laws of 1927. Both the statute and the resolution adopted thereunder violated the Fourteenth Amendment because they authorized and worked a classification based on color.

The language of the new Article 3107 as enacted by Chapter 67 of the Laws of 1927 is broad enough to be an authorization from the Texas Legislature empowering the State Executive Committee of the Democratic Party to determine, among other things, that only white Democrats shall be qualified to vote at Democratic primary elections.*

If the Democratic Legislature of Texas could not constitutionally forbid Negroes to vote at primaries in view of the decision of this Court in *Nixon* v. *Herndon,* it could nevertheless with a feeling of assurance entrust to the Democratic State Committee power to enact such prohibition and achieve the same end.†

Legislative Intention.

That it was the legislative intention to accomplish this purpose and to evade and nullify that decision appears from the face of the enactment. The statute expressly indicates that the new Article 3107 was being substituted

* See Chapter 67 of Laws of 1927, set forth in full at page 3, *supra.*

† This Court has held that a legislative body cannot accomplish by indirection something which it is without power to do directly. *Cf. Hammer* v. *Dagenhart,* 247 U. S. 251, and *Child Labor Tax Case,* 259 U. S. 20. And see *Bailey* v. *Alabama,* 219 U. S. 219.

for the one held unconstitutional, in order to take care of the "emergency" created by the decision in *Nixon* v. *Herndon*. What could this emergency be if not that Negroes would be able to vote at the next primary election unless some new method were devised to exclude them? If the Legislature had intended to meet the emergency in such a manner as to conform to, rather than circumvent the decision of this Court which created the so-called emergency, it is unthinkable that the Legislature would not expressly have stated in the new provision that the wide language conferring authority on the Executive Committee to determine who should vote at primary elections was not to be construed to authorize the exclusion of Negroes because of their race and color. The Legislature was actively aware of the necessity of limiting the authority of the State Committee, for it did actually impose limitations by the proviso which forbade the denial of the right to vote at primary elections "because of former political views or affiliations or because of membership or non-membership in organizations other than the political party." It would have been a simple matter to add the words "or because of race or color." The failure of the Legislature to do so in the light of the declared emergency created by the invalidation of the former Article 3107 enacted in May, 1923, completely disposes of any and all doubt as to the proper construction of the new statute of 1927. By providing that the Executive Committee "shall in its own way determine who shall be qualified to vote," Chapter 67 of the Laws of 1927 plainly delegated authority to the committee to determine among other things that only white Democrats should be entitled to vote at Democratic primary elections.*

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* Senator Thomas P. Love, a member of the Texas Senate when Article 3107 was adopted in 1927, filed in his own behalf a brief in the Texas Supreme Court in *Love* v. *Wilcox*, 28 S. W. (2d) 515, in which he was plaintiff. In that brief he said that the statute had "no other purpose whatsoever" than "to provide, if possible, other means by which Negroes could be barred from participation, both as candidates and voters, in the primary elections of the Democratic Party, which would stand the test of the courts." And see *House Journal* of First Called Session of the Fortieth Legislature of Texas, at pages 302 *et seq.*, and arguments by Representatives Faulk and Stout discussing Article 3107, which was House Bill No. 57.

The Democratic State Executive Committee did "in its own way determine who shall be qualified to vote" by providing that only "white Democrats" who are qualified under the Constitution and laws of Texas and who subscribe to Article 3116 of the Revised Civil Statutes, should have the right to vote in the primaries of July 28, 1928, and August 25, 1928 (see Resolution *supra*, p. 3).

It would seem to follow as a matter of course that the Democratic State Executive Committee was acting under and pursuant to the authority which the Legislature had conferred upon it.

The Legislature, then, having given to the Democratic State Executive Committee the authority to fill in the blank which it left in the statute as to the qualification of voters at primaries, made the Democratic State Executive Committee pro tanto its agency, and the old maxim qui facit per alium facit per se is applicable.

It follows that the resolution of the Executive Committee must be read as an integral part of the statute itself, and when superimposed upon Chapter 67 of the Laws of 1927, this new section is identical with the old Article 3107 which was considered and condemned in *Nixon* v. *Herndon*.

Although the new Article 3107 makes no discrimination against Negroes in so many words, this Court cannot accept the statute at its face value, but must go further and examine what has been accomplished behind and by means of its bland exterior by the Democratic State Executive Committee. In the words of Mr. Justice Matthews in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this court in *Henderson* v. *Mayor of New York*, 92 U. S. 259;

Chy Lung v. *Freeman*, 92 U. S. 275; *Ex parte Virginia*, 100 U. S. 339; *Neal* v. *Delaware*, 103 U. S. 370; and *Soon Hing* v. *Crowley*, 113 U. S. 703."

This Court has on other occasions rejected as unconstitutional statutes which sought to re-establish the *status quo* of the days before the adoption of the Fifteenth Amendment by excluding Negro voters from the polls through the medium of "grandfather clauses."

Guinn v. *United States*, 238 U. S. 347.
Myers v. *Anderson*, 238 U. S. 368.

The "Inherent Power" Argument.

It is urged by the respondents and by the courts below (R. 25, 30) that regardless of the statute there is inherent power in the political party to prescribe the qualifications of its own members and those entitled to vote at party primary elections. It has been shown above that the Democratic State Executive Committee intended to act under the new Article 3107; but **even if the Committee did not intend to act under the statute it could not avoid doing so.** For assuming that such inherent power existed before the Legislature of Texas manifested its intention to take over the field of primary elections by enacting legislation touching on every phase of the primary, including the qualifications of voters, this power no longer exists over the qualifications of voters at party primaries.* It is sufficient that the Legislature has spoken on this subject. It has invaded the field of the primary and it must therefore be deemed to have assumed full control of the situation.

The State being the supreme sovereignty, it must be deemed to have superseded whatever sovereign powers

* This does not mean that for some purposes the Executive Committee may not have inherent power still unaffected by the action of the Legislature; nor does it mean that if the Legislature had not acted with respect to primaries, the parties would not have had jurisdiction over the composition of the electorate at such primaries. These are matters that need not now be questioned or decided.

political parties may previously have had with respect to the control of primaries and party membership. Fruitful analogy and ample support and authority are supplied by the cases which have dealt with the relation of Congress and the State Legislatures in connection with the Commerce Clause and the State police powers.*

That the State has expressed itself in regard to primaries is evidenced by old Article 3107, considered in *Nixon* v. *Herndon,* in which the Legislature specifically provided the qualifications of voters at primary elections. It also provided by Article 3110 of the Revised Civil Statutes of 1925 a statutory pledge for voters.†

It is clear from the face of Chapter 67 of the Laws of 1927 that the Legislature did not relinquish its sovereignty when it delegated its power to determine the qualifications of voters at primaries to the party executive committees, because (1) the new statute did not purport to withdraw legislative sovereignty but merely to substitute a new provision in place of the one declared unconstitutional, the statute, to quote its own terms, being "to repeal Article 3107 of Chapter 13 of the Revised Civil Statutes of Texas, and *substituting in its place* a new article * * *," and (2) the statute contains explicit limitations on the power of the party executive committees forbidding them to deny the right to participate in a primary "because of former political views or affiliations or because of membership or nonmembership in organizations other than the political party."

There is ample authority in the decisions of the Texas courts to demonstrate that the Democratic Party in Texas and its Executive Committee had ceased to have any in-

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* See article by Thomas Reed Powell, 12 Minn. Law Rev. 321, 470; *Lindgren v. United States,* 281 U. S. 38, 46.

†"Art. 3110. *Test on ballot.* No official ballot for primary election shall have on it any symbol or device or any printed matter, except a uniform primary test, reading as follows: 'I am a..... (inserting name of political party or organization of which the voter is a member) and pledge myself to support the nominee of this primary'; and any ballot which shall not contain such printed test above the names of the candidates thereon, shall be void and shall not be counted."

See also Article 2955, qualifications for voters which are applicable to primary elections. Texas Election Law pamphlet, p. 26.

herent power to prescribe qualifications of voters at Democratic primary elections long before the resolution here in question was adopted.*

In *Briscoe* v. *Boyle,* 286 S. W. 275 (Tex. Civ. App., 1926), this very question was squarely presented and the Court held that all inherent power in the premises ceased to exist when the Legislature entered the field of primary election regulation and enacted legislation concerning the qualifications of voters at such elections.† In that case a county Democratic executive committee adopted a resolution excluding from primary elections all who had voted against any Democratic gubernatorial nominee in the previous election. Fourteen such persons brought suit against the judges of election to enjoin them from enforcing the resolution. The injunction was denied in the lower court but on appeal it was granted. The Texas Court of Civil Appeals considered at length the legislative situation with respect to primary elections and held that since the State of Texas had legislated in detail concerning the qualifications of voters at such elections, the political parties themselves no longer had any power to prescribe qualifications not made under authority of the statute. The Court said at page 276:

> "Before the legislative department invaded the province of party government, and assumed control and regulation of party machinery, the right to say who should and who should not participate in party affairs was exercised by the party governments, with which the courts would not concern themselves.
>
> **But the Legislature has taken possession and control of the machinery of the political parties of the State, and, while it permits the parties to operate that machinery, they do so only in somewhat strict accordance with the rules and regulations laid down in minute and cumbersome detail by the legislative body.** The statute designates the official positions to be occupied in the parties, and, while it permits the members of the parties to select such officials,

* And see 43 Harv. Law Rev. 467, 471; 39 Yale Law Journ. 423, 424.
† That case involved the old Article 3107 prior to its consideration by this Court in *Nixon* v. *Herndon.*

they can do so only in the manner prescribed by the statutes, which define the powers and duties of those officials, beyond which they cannot lawfully act. The statute prescribes the time, place, and manner of holding primary elections. It prescribes the forms of the ballots to be used, and the process by which the election officials shall identify and hand out the ballots and by which the voters shall mark and deposit the ballots when voted. It prescribes the declaration to be made by the voter, and the obligation to be assumed by him as a condition precedent to the validity of his ballot. In fine, the Legislature has in minute detail laid out the process by which political parties shall operate the statute-made machinery for making party nominations, and has so hedged this machinery with statutory regulations and restrictions *as to deprive the parties and their managers of all discretion in the manipulation of that machinery.* * * *

By excluding negroes from participating in party primary elections, and by legislating upon the subject of the character and degree of party fealty required of voters participating in such elections, *the Legislature has assumed control of that subject to the exclusion of party action*, thus depriving the party of any power to alter, restrict or enlarge the test of the right of the voter to participate in the party primaries." (Black type and italics ours.)*

The argument of "inherent power" has been disposed of by the Texas Courts in *Love* v. *Wilcox*, 119 Tex. 256, 28 S. W. (2d) 515 (Texas, 1930), which involved the very statute under consideration in this case. There the plaintiff sought a mandamus to compel the Democratic State and County Executive Committees to place his name on a gubernatorial ballot of the Democratic primary and to desist from enforcing a resolution passed in February, 1930, by the Democratic State Executive Committee, which precluded anyone from becoming a candidate at the Democratic primaries if he had voted against the party in the

* The force of that decision was in no way diminished when this Court invalidated the particular provision which excluded Negroes from participating in primary elections. That was only one of many provisions regulating such elections and is clearly treated as such in *Briscoe* v. *Boyle*. The principle of the *supreme sovereignty* of the State over primaries, as against that of the political parties, remains unimpaired.

1928 elections after having participated in the Democratic primary of that year. The Executive Committee sought to justify its action on the basis of its inherent power to manage the affairs of the party and to determine who could present his name for nomination at a primary. The Supreme Court of Texas issued the mandamus, holding that the Executive Committee had no inherent power to exceed any of the limitations for which the Legislature had provided in Article 3107. The Court no doubt had in mind the possibility that its decision might be used as a basis for attacking the Executive Committee resolution barring Negroes from primary elections, and expressly stated that it was not passing on that question. The Court guardedly referred to Article 3107 as a "recognition" by the Legislature of the right of the Democratic Party to create an Executive Committee and to confer on it various discretionary powers concerning the regulation of primary elections. The Court pointed out, however, that the Legislature had limited the scope of this "recognition" by the proviso at the end of Article 3107 and construed this proviso to apply to the exclusion of candidates for nomination because of any form of past disloyalty to the party. Here again inherent power is shown to have dissolved upon the application of State sovereignty.*

The improper application of this power by the Legislature did not take it from the field of sovereignty and restore the inherent power of the party Executive Committee. If this had been so there would have been no such "emergency and an imperative public necessity" referred to in Chapter 67 of the Laws of 1927. Only the lack of inherent power to exclude Negroes could have created this emergency, just as only the legislative intention to confer a statutory power could have led the Legislature to meet the emergency in the way it did.

Furthermore, the enactment of Chapter 67 of the Laws of 1927 would automatically deprive the Democratic Ex-

* The *Briscoe* case was cited as authoritative by the Supreme Court in the *Love* case.

ecutive Committee of any inherent power to bar Negroes from its primary elections if such inherent power had not already been terminated by virtue of the prior enactment. This is true whether, as we contend, the statute is a direct delegation of authority to prescribe qualifications discriminating against Negroes or whether it be a mere general authority to prescribe the qualifications of voters at primary elections delegated by the Legislature.

Under *Bristoe* v. *Boyle* and *Love* v. *Wilcox, supra,* it would have been impossible for the inherent power to survive the creation of the statutory power. The two powers could not exist side by side, and as between them the one conferred by statute must prevail.

"Recognition" of Power Argument.

This would be equally true if Article 3107 is regarded as a "recognition" by the Legislature of the existence of power on the part of the Democratic Party to prescribe through its Executive Committee that only white Democrats shall vote at its primary elections. It could not reasonably be construed as a recognition of *inherent* power because, as we have shown, it was a very plain recognition to the contrary. But even if it had purported to be such a recognition, it would have been a recognition of a non-existing fact, it being clear that no inherent power could have existed after the State sovereignty had taken over the field. If such a recognition could have any effect at all, it would have to be as a recognition that the power once had existed and as a declaration of a legislative intention that it should once again come into existence. **Whether this be regarded as the creation of a new power or the recognition and restoration of an old one, the existence of the power itself would be necessarily and wholly dependent upon the force of the statute and hence would be a statutory power, not an inherent one.**

Moreover, there is no reason why a legislative "recognition" even of an existing inherent power should not turn

the inherent power into a statutory one. That is precisely what was held in *Briscoe* v. *Boyle,* where the various statutory provisions as to how primary elections should be conducted admittedly conferred powers on the Democratic Party and its Executive Committee, which up to the time of the legislative action the party and the committee had enjoyed under their general inherent power to manage their own affairs. There is no material difference in form or substance between these statutory provisions (all but one of which are still in force to-day) and the new Article 3107. If the latter can be regarded as a "recognition" of inherent power, then all the provisions must be regarded as such; and this very recognition by the Legislature of powers, whose existence and exercise had been a purely private internal affair of the Democratic Party, would itself supply the only expression of legislative intention which is needed under the decisions in *Brisco* v. *Boyle* to turn the private affair into a State affair and to transform the inherent power into a statutory power.

Other Texas authorities are to the same effect.*

The Texas cases, with one exception, all confirm our contention that the party executive committees are agencies of the State, subject to legislative control and endowed with powers by the Legislature. The exception to this rule is *White* v. *Lubbock* (Tex. Civ. App., 1930), 30 S. W. (2d) 72, which involved the right of a Negro to vote in a primary, and where the Court held that the party had inherent power to exclude Negroes. This would indicate that only where a Negro is concerned do the usual rules of construction and the common principles of substantive law fall down. But even were the bulk of the Texas cases not in accord with the view here urged, it would be of no importance, because it was recognized by this Court in the *Home Telephone & Telegraph* case that the *local* conception of State action may differ from the *national* conception of State action. In that case it

* *Clancy* v. *Clough,* 30 S. W. (2d) 569, which held that membership on a City Democratic Executive Committee was itself subject to statutory qualifications which could not be added to by the Committee; *Love* v. *Taylor,* 8 S. W. (2d) 795; *Friberg* v. *Sturry,* 33 S. W. (2d) 762.

was urged that because the municipal body which had fixed the telephone rates had exceeded its authority no State action was involved. This Court refused to accept that view, holding, on the contrary, that the action was State action, the rates confiscatory and that the Fourteenth Amendment applied "to every person whether natural or juridical who is the repository of State power." The emphasis, therefore, was not upon whether power was properly applied, but upon whether State power in fact existed. So here the holding of the State Court that political parties have inherent power to exclude Negroes from primary elections, and in so acting were not exercising state powers, is not binding upon this Court.

In conclusion, we submit that the Executive Committee had no inherent power to adopt the resolution which provided that only white Democrats could vote in the primary election. The only power which the committee could have had, it received from the Legislature of the State. The Legislature by the new Article 3107 intended the committee to adopt such a resolution as was adopted and the committee acted with this specific statute in mind. Under the Texas authorities, no other action by the committee would have been possible. The action of the committee, therefore, and the action of the Legislature are equally in violation of the Fourteenth Amendment.

B. Even if the Democratic State Executive Committee in adopting the resolution restricting voting at Democratic primaries to "white" Democrats exceeded the powers delegated to it by the Legislature in Chapter 67, Laws of 1927, its action, though ultra vires, constituted State action in violation of the Fourteenth Amendment because it authorized and worked a classification based on color.

Under the decisions of this Court in *Home Tel. & Tel. Co.* v. *Los Angeles,* 227 U. S. 278, and the cases consistently in accord therewith (*Raymond* v. *Chicago Traction Co.,* 207 U. S. 20; *Fidelity & Deposit Co.* v. *Tafoya,* 270 U. S.

426; cf. *Yick Wo* v. *Hopkins*, 118 U. S. 356), it has become definitely established that the limitations which the Fourteenth and Fifteenth Amendments impose upon State action apply not merely to the enactment of legislation by State Legislatures but also, among other things, to action taken pursuant to such statutes by those selected to act thereunder. We may have a statute which is itself subject to no constitutional objection, and which authorizes altogether proper action to be taken by designated persons on behalf of the State. Yet, if these persons disobey the statute and take action thereunder which, if taken by the State, would be violative of the Fourteenth or Fifteenth Amendment, their action is State action, permitting those injured thereby to seek redress therefor by suit or action in a Federal court. As this Court has said in *Home Tel. & Tel. Co.* v. *Los Angeles, supra* (pp. 286-287):

> "the provisions of the (Fourteenth) Amendment as conclusively fixed by previous decisions are generic in their terms, are addressed, of course, to the states, but also to every person whether natural or juridical who is the repository of state power. By this construction the reach of the Amendment is shown to be coextensive with any exercise by a state of power, in whatever form exerted * * * **where an officer or other representative of the state in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the state has authorized the wrong is irrelevant** and the Federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power." (Black type ours.)

In view of the considerations advanced under Point II, subdivision A, *supra*, it is clear, we submit, that the Democratic State Executive Committee falls precisely within the foregoing decision so far as concerns its action in adopting the resolution limiting voting at the primary election of July 28, 1928, to white Democrats. If its action in adopting the resolution was not authorized by Article

3107, it necessarily was an abuse of the power to determine the qualifications of voters at primary elections which the committee possessed under that statute. It nevertheless was action to which the reach of the Fourteenth Amendment extended, and being action which denied to Negroes the equal protection of the laws, it was action which was forbidden by that Amendment and which therefore was void, because in the *Home Telephone & Telegraph* case this Court recognized that although within the boundaries of the State the action of a State agency might be *ultra vires*, it might nevertheless, in this forum, be deemed State action violative of the Fourteenth Amendment.

Nor, if it be assumed, as we have in this sub-point assumed, that the Executive Committee was not authorized under the broad language of Article 3107 to determine among other things, that only white Democrats may vote at Democratic primary elections, can the Committee claim that any such classification could rest upon its inherent power. In making this assumption as to the scope of the generic language in the present Article 3107 we are reading into it an implied limitation as to the scope of the grant which it intended to confer upon the Executive Committee. Certainly if an express limitation to this effect were included in the Article, the Executive Committee could hardly claim any inherent power to exceed it; and there is no reason why an implied limitation should not have the same effect once that implication is made.

This is conclusively covered by *Love* v. *Wilcox, supra*. In that case the Supreme Court of Texas had before it the limiting clause in the present Article 3107 which precluded the operation of the general grant in Article 3107 as to the past loyalty of those who participated in the prior primaries of the Democratic Party. Nowithstanding this provision the Democratic State Executive Committee sought to keep Love from becoming a candidate in the Democratic primary because he had voted against the party in the 1928 elections after having participated in the party primary of that year. The Committee sought to justify its action on the basis of its inherent power to

manage the affairs of the party and to determine who could present his name for nomination at a primary.

The Supreme Court of Texas flatly held that the Executive Committee had no inherent power to exceed any of the limitations which the Legislature had provided for in Article 3107. If, therefore, we read a limitation into Article 3107 so that it is not regarded as covering such a classification as made in the resolution, it follows from *Love* v. *Wilcox* that the Executive Committee could under no circumstances by virtue of any power of its own exceed the limits which the Legislature had drawn. The Committee could make no more claim to inherent power to exceed this limitation than to exceed the limitation with respect to past partly disloyalty so completely disposed of in *Love* v. *Wilcox*. It follows therefore that even if the present Article 3107 be assumed—contrary to the entire legislative history of the Article—not to have authorized the resolution, nevertheless the resolution could not be based upon any inherent power of the Executive Committee, but is referable only to the position in which the Executive Committee was put by whatever grant of power Article 3107 made to the Committee. This follows from the doctrine of *ultra vires* use embodied in the *Home Tel. & Tel. Co.* case. Under any construction therefore of Article 3107 the classification in the resolution must be deemed State action because the statute alone has made the resolution possible.

C. The Democratic State Executive Committee, acting in relation to primary elections, was part of the governmental machinery of the State. The resolution of that Committee restricting voting in Democratic primaries to "white" Democrats was State action and violated the Fourteenth Amendment and afforded respondents no justification in denying to petitioner the right to vote.

In the preceding points we have shown that although the primary machinery was originally the private affair

of the party, it has become absorbed by the State, which has exercised its sovereignty over primary elections with the "rules and regulations laid down in minute and cumbersome detail" (*Briscoe* v. *Boyle,* quoted *supra,* at pages 23-24).

Political parties now, in Texas at least, have become State agencies in their relations to elections and primaries.

In *"Primary Elections"* by Merriam & Overacker (1928 Edition), the authors state at page 140:

> "The theory of the party as a voluntary association has been completely overthrown by the contrary doctrine that the party is in reality a governmental agency subject to legal regulations and control."

And see the able article by Meyer M. Brown in 23 Michigan Law Review, 279.

Bliley v. *West,* 42 F. (2d) 101, arose out of a similar effort by the State of Virginia to disenfranchise Negroes in the primary elections. There the statute described voters as "all persons qualified to vote at the election for which the primary is held, and not disqualified by reason of other requirements in the law of the party to which he belongs". The Democratic State Convention of 1924 in Virginia adopted a resolution declaring that only white persons should participate in the Democratic primary. The action was brought for damages against the judges of election who set up that resolution as a justification. Defendants demurred and the District Court overruled the demurrer in an opinion written by Judge Groner (33 F. [2d] 177). The case went to trial. Upon appeal from the final judgment in favor of the plaintiff the Circuit Court of Appeals for the Fourth Circuit affirmed the judgment, adopting the opinion of Judge Groner as its own.

Judge Groner cited the case of *Commonwealth* v. *Willcox,* 111 Va. 849, at page 859, in which the Court held that a primary once adopted by a political party becomes and constitutes a necessary part of the election machinery and "fulfils an essential function in the plea to promote honesty in the conduct of elections—elections which shall

faithfully reflect and register the unbought will of the electors."

The primary machinery is therefore no longer the peculiar province of the political party and the test of the superior sovereignty of the State over that of the party in relation to the function of the party in the primary machinery is to be found in such cases as *Love* v. *Wilcox, supra,* where the Supreme Court of Texas held that Chapter 67 of the Laws of 1927 prohibited the party executive committee from excluding a candidate from the party primaries because of past disloyalty to the party and could not be overridden by any action of the party executive committee, *Briscoe* v. *Boyle, supra,* which decided that under the old Article 3107 the party could not add to the qualifications fixed by the Legislature in determining qualifications for party members, and *Clancy* v. *Clough* (Tex.), 30 S. W. (2d) 569, where it was held that the executive committee of the City of Houston was without power to regulate the requisites for candidates for membership on the executive committee itself on the ground that Articles 3110 and 3111 of the Revised Civil Statutes completely covered the field of qualifications.

In other words, those cases hold that the party committees are so much controlled by State authority that they are without power to vary on their own initiative the qualifications prescribed for voters, candidates or committee members.

It must be clear, then, that whether or not the Legislature intended by Chapter 67 of the Laws of 1927 to vest in the State Executive Committee the power to exclude Negroes from Democratic primaries, the Legislature adopted the executive committee as its agency in the administration of the primary laws.*

* The very existence of such bodies as the County and State Executive Committees depends upon the statutes. Articles 3100, 3118 and 3139 (Tex. Rev. Civ. Stats. 1925) deal with who shall choose these bodies and how that shall be done. And these bodies are created by the statute to perform the manifold duties which are minutely prescribed in nearly each one of the approximately 70 sections which comprise the primary law (Chap. 13, *ibid.*) of the State of Texas. Thus this Committee and their powers and duties are created as parts of the entire primary machinery.

It follows as an elementary proposition that the State cannot perform by an agency an act which it could not accomplish in its own name, that it cannot give force of law to a prohibited enactment, from whatever source originating.

Williams v. *Bruffy*, 96 U. S. 176.
Ford v. *Surget*, 97 U. S. 594.
King Mfg. Co. v. *Augusta*, 277 U. S. 100, 107-114.
Home Tel. & Tel. Co. v. *Los Angeles*, 227 U. S. 278.

In *Standard Scale Co.* v. *Farrell*, 249 U. S. 571, at page 577, Mr. Justice Brandeis said:

> "* * * For the protection of the Federal Constitution applies, whatever the form in which the legislative power of the State is exerted; that is, whether it be by a constitution, an act of the legislature, or an act of any subordinate instrumentality of the State exercising delegated legislative authority, like an ordinance of a municipality or an order of a commission."

The resolution which was adopted by the Democratic State Executive Committee restricting the primaries to white Democrats is therefore within the same prohibition of the Fourteenth Amendment as would have been a direct legislative enactment to this effect.

Nor does such a case as *Waples* v. *Marrast*, 108 Tex. 5, 184 S. W. 180, holding that a political party is not an agency of the government of Texas and hence it was unconstitutional for the Legislature to attempt to provide for the expense of a primary election out of the State treasury, detract from the conclusion just stated. Political parties and primary elections may be deemed cogs in the State election machinery for some purposes and not for other purposes.*

* Compare *Briscoe* v. *Boyle*, *supra*, and *State ex rel. Moore* v. *Meharg* (Tex. Civ. App., 1926), 287 S. W. 670, with the *Waples* and *White* cases, *supra*.

Moreover, it was recognized in the *Home Telephone & Telegraph* case that the local conception of State action may differ from the national conception of State action.

D. Respondents by reason of their office as judges of election derived their power to deny the petitioner the right to vote at the primary election from the statutes of the State. In applying that power to a State purpose in such a way as to work a color classification they violated the Fourteenth Amendment irrespective of Chapter 67 of the Laws of 1927 and the resolution of the Democratic State Executive Committee.

The opinion of the District Court states that (R. 25):

> "The Court also holds that the members of a voluntary association, such as a political organization, members of the Democratic party in Texas, possess inherent power to prescribe qualifications regulating membership of such organization, or political party. That this is, and was, true without reference to the passage by the Legislature of the State of Texas of said Art. 3107, and is not affected by the passage of said act, and such inherent power remains and exists just as if said act had never been passed."

That this holding is diametrically opposed to the decisions of the Texas courts in *Briscoe* v. *Boyle, supra,* and in *Love* v. *Wilcox, supra,* has already been demonstrated (see pp. 23-26, *supra*). But assuming, for the sake of argument, that the holding were correct, and assuming even that the action of the State Executive Committee was not State action within the meaning and application of the Fourteenth Amendment, it still would not follow that the action of the *defendants* complained of in the case at bar also was not State action in violation of that

Amendment. This litigation is not brought against the members of the Executive Committee because of their action in adopting the resolution barring Negroes from the primary election of July 28, 1928. It is brought against the judges of election, who—whether they be deemed State officials, party officials or the representatives of the contending candidates who contribute to their remuneration—are clothed with the power to act in the capacity of judges of election at primary elections by the State itself. **Though their designation may come from the party, their powers flow from the State alone and their function as judges of election is to accomplish a State purpose.**

The Texas Legislature has with meticulous care provided for the time, place and manner of holding primary elections and of determining and contesting the results.

Primary elections are themselves compulsory, under the Texas statutes, for all parties which cast more than 100,000 votes at the last general election (1925 Tex. Rev. Civ. Stats., Elections, Art. 3101). Actually, this provision always has applied and now does apply only to the Democratic Party, because it alone has been able to muster the requisite number of votes. The time, place and manner of holding primary elections, as well as of determining and contesting the results thereof, are comprehensively and minutely prescribed by statutory provisions (1925 Tex. Rev. Civ. Stats., Elections, Arts. 3102-3105, 3108, 3109-3114, 3116-3117, 3120, 3122-3127, 3146-3153).

Authority Vested in Judges of Election.

Among these provisions are the ones which provide for the appointment of judges of election (Art. 3104) and prescribe their functions, powers and duties (Arts. 3105, 3006-3007). These include, among others, the following (Art. 3105):

> "Judges of primary elections have the authority, and it shall be their duty, to administer oaths to

preserve order at the election, to appoint special officers to enforce the observance of order and to make arrests, as judges of general elections are authorized and required to do. Such judges and officers shall compel the observance of the law that prohibits loitering or electioneering within one hundred feet of the entrance of the polling place, and shall arrest, or cause to be arrested, anyone engaged in the work of conveying voters to the polls in carriages or other mode of conveyance, except as permitted by this title."

The power "to administer oaths * * * as judges of general elections are authorized and required to do" embraces, above all others, a power to administer such oaths for the purposes of ascertaining the qualifications of a challenged voter. It is for this purpose, indeed, that the power to administer oaths is conferred upon judges of election. Article 3006 provides:

"When a person offering to vote shall be objected to by an election judge or a supervisor or challenger, the presiding judge shall examine him upon an oath touching the points of such objection, and, if such person fails to establish his right to vote to the satisfaction of the majority of the judges, he shall not vote."

The powers of judges of primary elections to preserve order, appoint special officers, enforce the observance of order and make arrests "as judges of general elections are authorized and required to do," as provided in Article 3105, refer to Article 3002, which for these purposes gives the presiding judge of elections "the power of the district judge to enforce order and keep the peace." *This is clearly a State judicial power.*

Article 2954 specifies the persons who are not allowed to vote. These include infants, idiots, lunatics, paupers,

and the like. They do *not* include Negroes, as such. Article 2955 then specifies the persons who *are* allowed to vote.*

In Title Six, Chapter Four, of the Texas Penal Code of 1925, relating to "Offenses Affecting the Right of Suffrage," † it is provided in Article 217 as follows:

> **"Refusing to permit voter to vote.** Any judge of any election who shall refuse to receive the vote of any qualified elector who, when his vote is objected to, shows by his own oath that he is entitled to vote, or who shall refuse to deliver an official ballot to one entitled to vote under the law, or who shall wilfully refuse to receive a ballot after one entitled to vote has legally folded and returned same, shall be fined not to exceed five hundred dollars."

Article 231 makes Article 217 specifically applicable to primary elections.

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* "Qualifications for voting.—Every person subject to none of the foregoing disqualifications who shall have attained the age of twenty-one years and who shall be a citizen of the United States, and who shall have resided in this State one year next preceding an election, and the last six months within the district or county in which he or she offers to vote, shall be deemed a qualified elector. The electors living in an unorganized county may vote at an election precinct in the county to which such county is attached for judicial purposes; provided that any voter who is subject to pay a poll tax under the laws of this State or ordinances of any city or town in this State, shall have paid said tax before offering to vote at any election in this State and holds a receipt showing that said poll tax was paid before the first day of February next preceding such election; and, if said voter is exempt from paying a poll tax and resides in a city of ten thousand inhabitants or more, he or she must procure a certificate showing his or her exemptions, as required by this title. If such voter shall have lost or misplaced said tax receipt, he or she shall be entitled to vote upon making and leaving with the judge of the election an affidavit that such tax was paid by him or her, or by his wife or by her husband before said first day of February next preceding such election at which he or she offers to vote, and that said receipt has been lost or misplaced. In any election held only in a subdivision of a county for the purpose of determining any local question or proposition affecting only such subdivision of the county, then in addition to the foregoing qualifications, the voter must have resided in said county for six months next preceding such election. The provisions of this article as to casting ballots shall apply to all elections including general, special and *primary* elections." (Italics ours.)

† Article 218 provides for a fine against a judge of election who tries to influence a voter "where an election, either primary, special or general, is being held," and other penal provisions apply to improperly opening the ballot (Art. 221), divulging a vote (Art. 222), interfering with the ballot (Art. 226), making a false canvass (Art. 227), false certification by the chairman (Art. 228), giving false certificate of election (Art. 229), wilfully failing or refusing to discharge his duty (Art. 230).

Thus it appears that even if these respondents be not State officers in the same category and to the same extent as the Governor or the Attorney General of the State, they are nevertheless quasi public officials, receiving the definition of their duties and the badge of their authority from the statutes of the State, and the Legislature has by its own edicts given to judges of primary elections the powers and duties of judges of general elections and subjected them to the same penalties applicable to judges of general elections.

It requires no extended argument to demonstrate that the conduct of primary elections is, when authorized by statute, a State function, pointed to achieving a fair expression of popular, sovereign will, and that the judges of election acting in their capacities as judges of primary elections are fulfilling a State purpose.

Consequences of Abuse of Powers.

It seems apparent, from the foregoing resumé of the Texas Election Laws, that the defendants, as judges of election were charged by the State of Texas with the function and duty of determining the plaintiff's qualifications, under the Texas laws, to vote at the primary election in question in the case at bar. It is equally apparent that in passing on those qualifications and in determining that the plaintiff did not meet them because he was a Negro, the defendants were improperly administering the powers and duties specifically conferred upon them, and upon them alone, by the State of Texas, for the purpose of enforcing, on behalf of that State, the laws which it had enacted with respect to the conduct of primary elections.

We submit, therefore, that the contention of the defendants that the wrong which they did the plaintiff in depriving him of his right to vote at the primary election over which they officiated, was not a wrong forbidden by the Fourteenth or Fifteenth Amendments, because those Amendments apply only to State and not to individual action, is wholly without merit. We have here the plainest

possible instance of a case "where," in the language of *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U. S. 278, 287, "an officer or other representative of a state in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Amendment," and, hence, where the misuse of this power itself supplies the requisite element of State action in the case at bar and eliminates the only possibility of differentiating it from *Nixon* v. *Herndon*.

It should be noted that the emphasis in the *Home Tel. & Tel. Co.* case is placed, not upon the official title of the actor, but upon the vesting in him of State power, viz., power granted by the State devoted to a State purpose. This is made clear from further quotations from the opinion of Mr. Chief Justice White at pages 287 *et seq.*, where he says, speaking of the Fourteenth Amendment:

> "It provides, therefore, for a case where one who is in possession of state power uses that power to the doing of the wrongs which the Amendment forbids even although the consummation of the wrong may not be within the powers possessed if the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrongdoer. That is to say, the theory of the Amendment is that where an officer or other representative of a State in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the State has authorized the wrong is irrelevant and the Federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power."

It was then pointed out that the Amendment, in looking to the enforcement of rights which it guaranteed and to the prevention of wrongs which it prohibited, did not proceed only upon the assumption that States acting in their governmental capacities "in a complete sense" may violate the provisions of the Amendment, but "which was more normally to be contemplated, that State powers might be

abused by those who possessed them and as a result might be used as the instrument for doing wrongs" and that the Amendment provided against this contingency. And again, at page 288, he said:

> "Under these circumstances it may not be doubted that where a state officer under an assertion of power from the State is doing an act which could only be done upon the predicate that there was such power, the inquiry as to the repugnancy of the act to the Fourteenth Amendment cannot be avoided by insisting that there is a want of power. * * * To repeat, for the purpose of enforcing the rights guaranteed by the Amendment when it is alleged that a state officer in virtue of state power is doing an act which if permitted to be done *prima facie* would violate the Amendment, *the subject must be tested by assuming that the officer possessed power if the act be one which there would not be opportunity to perform but for the possession of some state authority.*" (Italics ours.)

Applying that test to this case, it is clear that the respondents would not have had the opportunity to refuse to permit the petitioner to vote in the Democratic Party primary election if they had not become possessed of the power to act as judges of election through act of the Legislature of the State.

In *Yick Wo* v. *Hopkins*, 118 U. S. 356, it was held that an ordinance violates the Fourteenth Amendment if it confers upon municipal authorities arbitrary power at their own will and without regard to discretion in the legal sense of the term to give or withhold consent as to persons or places for the carrying on of a business, and that an administration of such an ordinance violates the provisions of the Fourteenth Amendment if it makes arbitrary and unjust discriminations founded on differences of race between persons otherwise in similar circumstances. This Court pointed to "the political franchise of voting" as one of the illustrations of the principle that a man should not be compelled to hold his life or means of

living or any material right essential to the enjoyment of life at the mere will of another. The Court said, at page 370:

> "Though not regarded strictly as a natural right, but as a privilege merely conceded by society according to its will, under certain conditions, nevertheless it is regarded as a fundamental political right, because preservative of all rights."

Mr. Justice Matthews said, at page 373:

> "In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, **whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of the equal protection of the laws which is secured to the petitioners, as to all persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States.** Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this court in *Henderson* v. *Mayor of New York*, 92 U. S. 259; *Chy Lung* v. *Freeman*, 92 U. S. 275; *Ex parte Virginia*, 100 U. S. 339; *Neal* v. *Delaware*, 103 U. S. 370; and *Soon Hing* v. *Crowley*, 113 U. S. 703." (Black type ours.)

Expenses of Primary Election.

It is suggested in the opinion of the District Court (R. 24), and again in the opinion of the Circuit Court of Appeals (R. 30), that in view of the fact that the respondents were paid for the services which they rendered as judges of election out of a fund derived from contributions by the participating candidates, they could not be acting as officers of the State of Texas. The source of remuneration is never determinative as to the status or official capacity of a person. There is no end of cases sustaining this proposition.* See:

Tumey v. *Ohio*, 273 U. S. 510;
Kimbrough v. *Barnett*, 93 Tex. 301, 55 S. W. 120;
Hendricks v. *The State*, 20 Tex. Civ. App. 178, 49 S. W. 705;
Willis v. *Owen*, 43 Tex. 41;
Lincoln v. *Hapgood*, 11 Mass. 350.

Nor is it material that the County Executive Committee of the party appoints the judges of primary elections. These appointments are made solely by reason of express statutory authority (Art. 3104, Tex. Rev. Cov. Stats., 1925), and membership on the County Executive Committee is itself subject to the sovereign will of the State as expressed in Article 3107. To this effect is *Glancy* v. *Clough*, *supra*.

If, therefore, these judges of election have abused their powers derived from the State and have used them "as the instrument of doing wrong," their actions are State actions. The classification by reason of color is forbidden to the State by the Fourteenth and Fifteenth Amendments and this prohibition is controlling not only in so far as the legislative action is concerned, but also applies to anyone acting under authority lodged in him by the State.

*Cases are collected in exhaustive note in 53 A. L. R. 595. See also 72 U. of Pa. Law Rev., p. 222, Note 9; 15 Cornell Law Quar. 267.

To reduce the Democratic primary election to the status of a purely private election akin to the election of the officers of the Klu Klux Klan, or of any other private lodge, league or "voluntary association," it would be necessary to view the situation not merely without reference to Article 3107 but also without reference to all of the other statutory provisions which have just been considered. This it is improper to do unless the Texas Legislature was without power to enact these provisions. Such a contention has not been made, and need not be considered, the existence of the requisite legislative power being too clear for argument.

It also hardly requires argument to establish that the defendants' statutory duties as officers or representatives of the State of Texas could not possibly be justified or affected by the purely private action of a political party any more than by the action of any private lodge or voluntary association which might presume to interfere with the conduct of primary elections in Texas. Powers and duties provided for by statute can be abrogated or changed only by or pursuant to statute, and private resolutions by private parties cannot justify abuses of such powers committed by those who are entrusted with their execution, as were these respondents.

In conclusion, we submit that on every reasonable alternative, we necessarily have the situation of a deprivation of the plaintiff's right not to be discriminated against at the polls by reason of his color; we have a lack of justification; and we have the fact that this unjustified deprivation was made possible only by the patent of authority with which the State has invested these respondents. We have, therefore, precisely the situation which, in *Nixon* v. *Herndon*, was held to support both a cause of action for damages and the existence of Federal jurisdiction.

III.

The right of petitioner to vote in the primary regardless of race or color was denied and abridged by the State of Texas, in violation of the Fifteenth Amendment.

In *Nixon* v. *Herndon, supra,* it was deemed unnecessary to consider the Fifteenth Amendment, because it seemed to this Court hard to imagine a more direct and obvious infringement of the Fourteenth, and while we believe that the Fourteenth Amendment is fully applicable to the present case, the Fifteenth Amendment likewise protects the petitioner.

It was determined in *Nixon* v. *Herndon* that the same reasons which allowed a recovery for denying the plaintiff a vote at a final election allowed it for denying a vote at a primary election that may determine the final result. It follows that if the denial of petitioner's right to vote violated the Fifteenth Amendment, he has an equally valid cause of action.

The petitioner's right to vote in this case was denied or abridged, if at all, "on account of race or color" (R. 3), and the denial or abridgment of this right was the direct result of action by the State of Texas. The same arguments with respect to State action contained in Point II *supra,* and addressed to the Fourteenth Amendment, are equally applicable to the Fifteenth.

A Primary Vote Is a Vote.

The question now to be considered is whether the petitioner's right to vote was denied or abridged by reason of the refusal of the respondents to permit him to *vote* at a *primary* election. In other words, is a vote at a primary election a vote within the intendment of the Fifteenth Amendment?

The Secretary of State proclaimed the Fifteenth Amendment to have been duly ratified on March 30, 1870. Section

31 of Title 8 of the United States Code (*supra*, p. 10) was adopted by Act of May 31, 1870 (Chap. 114, Sec. 1; 17 Stat. 40), and evidences a contemporaneous interpretation of the Fifteenth Amendment which applies the right to vote to "*any* election" by the people in a State or any subdivision.

The right to vote was certainly not then intended to be narrowly construed, because, as Mr. Justice Hunt said in *United States* v. *Reese*, 92 U. S. 214, "It was believed that the newly enfranchised people could be most effectually secured in the protection of their rights of life, liberty and pursuit of happiness, by giving them the greatest of rights among free men—the ballot. Hence the Fifteenth Amendment was passed by Congress and adopted by the States."

At this point it is well to indicate that the real issue is not whether a primary election is an election, but whether a vote at such an election is a vote contemplated by the Fifteenth Amendment. This distinction is of importance in a consideration of some of the cases on this subject.

"Vote" is defined in *Bouvier's Law Dictionary* as "suffrage; the voice of an individual in making a choice by many."

In *Funk & Wagnall's Standard Dictionary* it is defined as "1. A formal expression of will or opinion in regard to some question submitted for decision, as in electing officers, sanctioning laws, passing resolutions, etc.: commonly signified by the voice or by ballot, by a show of hands, or by rising to one's feet. * * *"

The word "vote" is used throughout the Texas Election Laws in its usual sense, and there is no distinction to be found in the use of the word in connection with primary or general elections. Article 3107 itself makes use of the expression, and unless the contrary is clearly shown, it must be deemed that the Legislature intended there to use "vote" in the same manner as it did in other parts of the statute.

In the light of Article 236 of the *Texas Penal Code* of 1925, it is difficult to see how any different definition can

be given to voting at a primary and voting at a general election. That article reads:

> "**Illegal voting at primary.**—Any person voting at any primary election called and held by authority of any political party for the purpose of nominating candidates of such political party for any public office who is not entitled to vote in the election precinct where he offers to vote at the next State, county or municipal election, or who shall vote more than once at the same or different precinct or polls on the same day, or different days in the same primary election, shall be fined not exceeding five hundred dollars, or be imprisoned in jail not exceeding sixty days, or both." *

Article 241 of the *Penal Code* provides that "whoever at a general, special or primary election votes or attempts to vote more than once shall be fined * * *." Again, Article 216 of the *Penal Code:* "Any judge of an election or primary who wilfully permits a person to vote, whose name does not appear on the list of certified voters of the precinct * * *" is subject to fine. And Article 3121 of the *Texas Revised Civil Statutes* of 1925 provides that the county tax collector shall deliver to the chairman of the county executive committee of each political party, for its use in primary elections, certified lists of qualified voters before the polls are open. That article further provides:

> "No primary election shall be legal, unless such list is obtained and used for reference during the election. **Opposite the name of every voter on said list shall be stamped, when his vote is cast, with a rubber or wooden stamp, or written with pen and ink, the words, 'primary—voted,' with the date of such primary under the same."** (Black type ours.)

The whole tenor of the primary laws of Texas is to protect the expression of the sovereign will of the people in nominating candidates, just as do the laws dealing with general elections (*Love* v. *Wilcox, supra*). The reason that this must be so is obvious. The primary election

* Compare Article 232, entitled "Illegal voting."

involves the initial and as we shall see, in Texas, the determinative choice of the officers of the government. Would it not be absurd, then, to regard the primary election as that of a private association, such as an election of a lodge or other social or business organization?

The Democratic primary is not essentially concerned with the choice of officers of the Democratic Party. Its concern is with the staff of government. It does not involve the issues of a private association, but the expression of the voice of the people in an affair of state.

While it is true that all of the voters at the final election are not eligible to vote at a primary election, this is not because of lack of power on the part of the voter. The only obstacles, other than race and color, are the pledge which Article 3110 requires him to make in good conscience that he will support the nominee of the primary at which he votes,* and Article 240 of the *Penal Code*, which forbids voting in the primary of more than one party.

This definition or classification of voters on the basis of their principles and the dictates of their consciences is quite another thing from a restraint upon voting based upon race or color. It is a provision, in the words of Mr. Justice Holmes in *Commonwealth* v. *Rogers*, 63 N. E. 421 (Mass.), adopted as a "precaution against the fraudulent intrusion of members of a different party for sinister purposes." In other words, the election laws grant the right of the citizen to express his sovereign will by his vote within broad classifications and aim to secure and protect that right.

Fifteenth Amendment Like Nineteenth.

If it were true that the right to vote guaranteed by the Fifteenth Amendment did not extend to primary elections, then the same would be true of the Nineteenth Amendment, which in identical words guarantees the right to vote without regard to sex. Surely no court would

* *Westerman* v. *Mimms*, 220 S. W. 178 (Texas); *Briscoe* v. *Boyle*, *supra*.

hold that a woman could be denied the right to vote at a primary merely because she was a woman. There is no distinction to be drawn between the two Amendments. The Fifteenth has been frequently held to be self-executing (*Neal* v. *Delaware*, 103 U. S. 370, 389; *Ex parte Yarbrough*, 110 U. S. 651, 665). And even were it not self-executing, Section 31, Title 8 of the *United States Code* expresses in statutory form what the Amendment contemplated, to wit, to eliminate forever from the classification of voters any limitation based on race or color, such as deprived this petitioner of his vote.

Historical Error.

Nor is the suggestion of the District Court (R. 20), that primary elections were unknown at the time of the adoption of the Fifteenth Amendment sound, nor does it serve to distinguish that Amendment from the Nineteenth Amendment. The Fifteenth Amendment was adopted in 1870. On March 26, 1866, California passed an Act (Chap. 359) regulating primaries, and on April 24, 1866, New York passed an Act (Chap. 783) also dealing with primaries.* And in 1868 the Union League Club of Philadelphia offered a prize to anyone who would suggest the best plan by which to overcome the evils of the primary system.†

Shortly on the heels of the passage of the Amendment came primary legislation in other States. In 1871 Ohio and Pennsylvania followed the example set by New York and California. In 1873 Nevada followed suit and in 1875 Missouri passed regulatory measures (Merriam & Overacker, *supra*, p. 12). These statutes were so widespread throughout the country as to reveal a general knowledge of the primary as a method of nomination at the time of the adoption of the Fifteenth Amendment.

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*See Merriam & Overacker, *supra*, pp. 8-12; Sargent on Law of Primary Elections, 2 Minn. Law Rev. 97.

†Union League Club of Philadelphia, "Essays on Politics," 1868.

The Newberry and Other Cases Distinguished.

The respondents and the District Court (R. 26) placed reliance on the decision of this Court in *Newberry* v. *United States*, 256 U. S. 232, which involved the constitutionality of Section 8 of the *Federal Corrupt Practices Act*, which undertook to limit the amount of money which a candidate for Representative in Congress or for United States Senator might contribute or cause to be contributed in procuring his nomination or election. In so far as it applied to a primary election of candidates for a seat in the Senate, the Fifteenth Amendment was in no way involved.

The meaning of the phrase "the right to vote" was not and could not have been considered, since there had been no denial or abridgment of that right on account of race, color, previous condition of servitude, or of sex. The sole constitutional question involved concerned the interpretation to be given to Article I, Section 4, of the Constitution, which provides:

> "The times, places and manner of holding elections for senators and representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

The question, therefore, was whether the limited right to deal with "the times, places and manner of holding elections" involved the right to regulate the use of money in connection with the primary election of candidates for the Senate and House of Representatives.

It was held that an undefined power in Congress over elections of Senators and Representatives not derived from Article I, Section 4, could not be inferred from the fact that the offices were created by the Constitution or by assuming that the Government must be free from any control by the States over matters affecting the choice of its officers. It was further held that the elections within

the original intendment of Section 4 of Article I were those wherein Senators should be chosen by Legislatures and Representatives by voters "possessing the qualifications requisite for electors of the most numerous branch of the state legislature."

It was likewise held that the Seventeenth Amendment did not modify Article I, Section 4, which was the source of congressional power to regulate the times, places and manner of holding elections; and, finally, that the power to control party primaries for designating candidates for the Senate was not "within the grant of power to regulate the manner of holding elections."

The "right to vote" is infinitely more comprehensive in its meaning, scope and operation than is the reference to the "manner of holding elections for senators and representatives," which was under consideration in *Newberry v. United States.*

Moreover, in that case Justices McReynolds, Holmes, Day and Vandevanter voted for reversal on the constitutional ground, while Mr. Chief Justice White, differing on the constitutional question, voted for a reversal and a new trial because of an error in the charge to the jury, and Justices Pitney, Brandeis and Clarke, likewise finding error in the instructions to the jury, were of the opinion that the Act itself was valid. Mr. Justice McKenna concurred in the opinion of Mr. Justice McReynolds "as applied to the statute under consideration, which was enacted prior to the Seventeenth Amendment, but reserved the question of the power of Congress under that Amendment."

It is clear from a reading of the opinions in the *Newberry* case that the principal issue was that of the sovereignty of the States as against the sovereignty of the Federal Government. The question was treated from the point of view of these contending sovereignties in their relation to the candidates. *No consideration was given to the right of the citizen to vote,* and consequently, the decision is no more relevant here on the question of the

right to vote under the Fifteenth Amendment than it was in *Nixon* v. *Herndon* on the right to bring a cause of action for the denial of a vote by means of unconstitutional classification.

To say, as did this Court in the *Newberry* case (p. 250), that primaries are "in no sense elections for an office but merely methods by which the party adherents agree upon candidates whom they intend to offer and support for ultimate choice by all qualified voters," does not dispose of the basic questions here, which are (1) whether a color classification shall enter into a definition of "party adherents" and (2) whether the method of agreement upon candidates to be offered and supported is a vote within the meaning of the Fifteenth Amendment.

Koy v. *Schneider,* 110 Tex. 369, likewise has no bearing on this case. There the word "elections" in the Constitution of the State of Texas was held not to include primaries. The case involved the Women's Suffrage Act of Texas enacted before the Nineteenth Amendment and which purported to give women the right to vote in a primary. The Constitution restricted suffrage in "elections" to men, and the Court, in order to permit women to vote in primaries under the statute, adopted a construction of the word "elections" contained in the Constitution which limited its application to general elections. Here, again, the question at issue was not a definition of the right to vote but of the meaning of an election, and the Court must have been influenced by the relative importance of primary elections over general elections.

On the other hand, in *Ashford* v. *Goodwin,* 103 Tex. 491, and *Anderson* v. *Ash,* 62 Tex. Civ. App. 262, it was held that the words "contested elections" applied to primaries as well as general elections and that consequently the District Courts had jurisdiction under the Constitution to consider a contest arising out of a primary election.

Petitioner's Right to Vote Abridged Even If Not Denied.

Even if it could be said that the refusal to permit the petitioner to vote at the primary election was not a denial of his right to vote, because he could still express his will at the general election, nevertheless his right to vote would have been abridged.

In States such as Texas, where the primary election is in a realistic sense the only true election, the vote at the final election is merely a formal flourish. The courts of Texas have taken judicial notice of the fact that for all practical purposes, and certainly in so far as State elections are concerned, there is only one political party, and that the real political battles of the State are not those held at the final election, but those waged for nomination at the Democratic primaries.*

So in *Ex rel. Moore* v. *Meharg* (Tex. Civ. App. 1926), 287 S. W. 670, the Court said:

> "Indeed it is a matter of common knowledge in this State that a Democratic primary election held in accordance with our statutes is virtually decisive of the question as to who shall be elected at the general election. **In other words, barring certain exceptions, a primary election is equivalent to a general election.**" (Black type ours.)

In an article by Meyer M. Brown in 23 *Michigan Law Review*, 279, the author says:

> "In Texas a victory in a primary on the Democratic side means practically certain election."

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* In 1930, Sterling, Democrat, defeated Talbot, Republican, by a plurality of 124,000 for Governor. In 1926, Moody, Democrat, defeated Haines, Republican, by 233,068 to 31,531. In 1924, Mrs. Ferguson, Democrat, beat Butte, Republican, 422,059 to 298,046 for Governor. In 1928, when the State of Texas went Republican for President, Connally, Democrat, defeated Kennerly, Republican, 566,139 to 129,910 for United States Senator (*World Almanac*, 1931, p. 904).

And in *Newberry* v. *United States, supra,* Mr. Justice White said, at pages 266-267:

> "The large number of States which at this day have by law established senatorial primaries shows the development of the movement which originated so long ago under the circumstances just stated. They serve to indicate the tenacity of the conviction that the relation of the primary to the election is so intimate that the influence of the former is largely determinative of the latter. I have appended in the margin a statement from a publication on the subject, showing how well founded this conviction is and how it has come to pass **that in some cases at least the result of the primary has been in substance to render the subsequent election merely perfunctory.**" (Black type ours.)

The publication referred to by Mr. Justice White as in the margin is *Merriam on Primary Elections* (1908 Ed., pp. 83-85), where it is said:

> "In many western and southern states the direct primary method has been applied to the choice of United States senators as well as to state officers. In the southern states, victory in such a primary, on the Democratic side, is practically the equivalent of an election, as there is but one effective party in that section of the country."

And so, too, in *Koy* v. *Schneider, supra,* Chief Justice Phillips said:

> "No court can blind its eyes to this universally known fact. * * * Of what use is it to enforce the Constitution only in general elections, when, in fact, the primary elections are the decisive elections in this State in the choosing of public officers."

Consequently only by the most tortuous sophistry can it be said that in denying the Negro the right to vote in the Democratic primaries of Texas and relegating him to the general election, his right to vote is neither denied nor abridged.

The rationale of the very attempt of Legislatures to control primaries must be that the citizen's right to vote in the final election would be abridged if a manipulation of primaries could in effect nullify the free expression of the voter's will at the general election.

Nor is it a valid answer to say that though the Negro is denied the right to vote in a Democratic primary he could still vote at a Republican primary. In the first place, under Chapter 67 of the Laws of 1927, the Republican State Executive Committee could adopt a resolution similar to that which was passed by the Democratic Committee. Secondly, to deprive him of his right to select between existing parties, even if not in violation of the Fifteenth Amendment, would be clearly a violation of the Fourteenth Amendment as an invalid classification which permits the white voter to take full advantage of the choice given under Article 3110 and deprives a colored man of a similar right to determine with what party in good conscience he should ally himself. Thirdly, as we have seen, it is idle to refer a man to the Republican Party in the State of Texas when the Democratic Party is the "one effective party in that section of the country" and the general election is "merely perfunctory."

IV.

Conclusion.

From what has been said it is clear that the State has, either by overt act of its Legislature or through the agency of the Democratic State Executive Committee or the judges of election, made a classification, based upon race and color, which has denied the petitioner the right to vote in a primary election. This was only made possible by the action of the State—either its direct action or its withdrawal of restraint or its grant of power to persons who could not have acted but for the grant of power.

This classification has not only worked a denial of the equal protection of the laws solely by reason of the petitioner's race and color, but it has in a very real sense deprived him of his vote, of an effective voice in the election of State officers, Congressman and Senator.

The result is unquestionably the disenfranchisement of the Negroes of Texas, and if the device here used is sustained by this Court there can be no question but that it will be followed by similar legislation in other States (see *Bliley* v. *West, supra; Holman* v. *Robinson, supra*). It will mean the disenfranchisement of millions of people, and history has shown that the disenfranchised, even more than the disinherited, are fruitful soil for communist propaganda on the one hand and enslavement on the other.

A narrow construction of the Fourteenth and Fifteenth Amendments in this case can only result in grave injury to the institutions which we have built up and to the whole structure of civil liberty which grew out of the Civil War days.

It is respectfully submitted that the judgment appealed from should be reversed, and the cause remanded for trial upon the merits.

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Supreme Court of the United States

OCTOBER TERM, 1931.

No. 265.

L. A. NIXON,

Petitioner,

against

JAMES CONDON and C. H. KOLLE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

JAMES MARSHALL,
NATHAN R. MARGOLD,
ARTHUR B. SPINGARN,
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INDEX

PAGE

POINT I—Under the statutes as they existed prior to the adoption of Chapter 67 of the Laws of 1927, there was no inherent power in the party to exclude the petitioner from the primaries. The power to do so was solely derived from Chapter 67 of the Laws of 1927 1-7

POINT II—Even if a political party be a voluntary association, it is clear not only (a) that it is subject to the sovereignty of the State, but also (b) that it can become an instrumentality of the State 7-8

POINT III—The election laws define and limit in meticulous detail the principal functions of political parties. This exercise of sovereignty has deprived the parties of their independence of action 8-15

POINT IV—The statute was principally aimed at Democratic Primaries 15-16

CITATIONS

CASES

	PAGE
Briscoe v. Boyle, 286 S. W. 275 (Tex. Civ. App.)	4, 14
Clancy v. Clough, 30 S. W. (2nd) 569 (Tex. Civ. App.)	4, 12
Clark v. Nash, 198 U. S. 361	7
Friberg v. Scurry, 33 S. W. (2nd) 762 (Tex. Civ. App.)	4, 12
Lawton v. Steele, 152 U. S. 133	17
Love v. Wilcox, 28 S. W. (2nd) 515, 119 Tex. 256	4, 5, 12
Nixon v. Herndon, 273 U. S. 536	1, 2
Offield v. N. Y., N. H. & H. R. R. Co., 203 U. S. 372	8
Strickland v. The Highland Boy Mining Co., 200 U. S. 527	8
Westerman v. Mims, 111 Tex. 29, 227 S. W. 178	4

TEXTS

Freund, Police Power	7

TEXAS CONSTITUTION

Article VI, Section 4	14

TEXAS STATUTES

Laws of 1927, Chapter 67 (present Art. 3107 of Rev. Civ. Stat.)	1, 2, 4, 5, 6, 7, 13, 15

PAGE

PENAL CODE OF 1925

Chapter Four
Article 216 5
Article 217 6
Article 231 6

Chapter Five
Article 236 6

Chapter Eight 13

REVISED CIVIL STATUTES OF 1925

Article 2342 10

Chapter Eight
Article 2937 10
Article 2938 10
Article 2939 10
Article 2940 10
Article 2941 10
Article 2954 3
Article 2955 ..... 3, 4, 14
Article 3093-A (former Article 3107) 2, 13

Chapter Thirteen
Article 3102 10
Article 3103 11
Article 3104 ..... 10, 11
Article 3105 11
Article 3107 ..... 1, 2, 4, 5, 6, 13
Article 3109 11
Article 3110 ..... 4, 5, 6, 14
Article 3111 ..... 11, 13
Article 3113 11
Article 3114 11
Article 3115 11
Article 3116 13
Article 3117 11
Article 3118 11

PAGE

Chapter Thirteen (continued)

Article 3119 11
Article 3121 . . . . . 3, 4, 6, 14
Article 3125 11
Article 3128 11
Article 3133 9
Article 3134 11
Article 3135 11
Article 3136 12
Article 3137 12
Article 3138 12
Article 3139 . . . . . 9, 12
Article 3141 12
Article 3144 13
Article 3145 13
Article 3146 12
Article 3147 12
Article 3148 12
Article 3149 12
Article 3150 12
Article 3151 12
Article 3152 12
Article 3153 12

Revised Statutes of 1911

Article 3096 4

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 265.

L. A. NIXON,
Petitioner,
against
JAMES CONDON and C. H. KOLLE,
Respondents.

PETITIONER'S REPLY BRIEF.

POINTS.

I.

Under the statutes as they existed prior to the adoption of Chapter 67 of the Laws of 1927 there was no inherent power in the party to exclude the petitioner from the primaries. The power to do so was solely derived from Chapter 67 of the Laws of 1927.

In petitioner's Main Brief it is argued (pp. 18-28):

(a) The Legislature intended the Democratic Party to exercise the powers granted in Chapter 67, Laws of 1927, in such a way as to keep Negroes from participating in Democratic primaries and thereby restore the *status quo ante Nixon* v. *Herndon*. For this purpose the party was the agent of the Legislature; there was a clear chain of causation from the legislative act to the discrimination against the petitioner.

(b) Any inherent power which the party may have had to determine the character of its membership was destroyed by the sovereign acts of the Legislature in adopting Article 3093-a in 1923 and Chapter 67 of the Laws of 1927.

In view of the argument made in respondents' brief with respect to inherent power the petitioner now proposes to show that **even before the adoption of the statutes** of 1923 and 1927 the Legislature had completely expressed its sovereignty and that no inherent power to determine party membership or primary participation remained in the political parties.

Respondents' position is based upon the contention that Article 3093-a (the old Article 3107) having been declared unconstitutional in *Nixon* v. *Herndon,* it must be deemed to have been null and void and that consequently the State never interfered with the inherent powers of the Democratic Party. From this premise respondents argue that Chapter 67 of the Laws of 1927 did not grant any new powers, did not add to the inherent powers of the party, but merely created a limitation upon the existing powers by prohibiting a political party from excluding any person "because of former political views or affiliations, or because of membership or non-membership in organizations other than the political party" (p. 8).

There are a number of answers to this argument.

First. The words of the statute are themselves a grant of power, to wit: "Every political party * * * shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party; * * *."

Even had there been no necessity for such a grant of power to the political party the State purported to exercise its sovereignty and to give the party the benefit of statutory support.*

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*A full discussion of this proposition is in Petitioner's Main Brief, pp. 18-28.

Secondly. Even prior to the Act of 1923 the State had defined party powers and who might vote in party primaries. In consequence, the limitation contained in Chapter 67 of the Laws of 1927 was not a limitation upon inherent powers already existing in parties, but was a limitation necessitated by the grant to the Executive Committee of the power to determine party membership. This is readily demonstrable by a reference to the statutes.

The list of voters eligible to participate in a party primary is determined by Article 3121, *Texas Revised Civil Statutes*, 1925, which article goes back as far as 1905. It provides that the county tax collector shall deliver to the chairman of the county executive committee of each political party for use in its primary elections certified lists of the qualified voters of each precinct of the county, and that the chairman of such executive committee shall place this list for reference in the hands of the election officers of each election precinct before the polls are opened.* Article 3121 then goes on to provide:

> "No primary election shall be legal, unless such list is obtained and used for reference during the election. Opposite the name of every voter on said list shall be stamped, when his vote is cast, with a rubber or wooden stamp, or written with pen and ink, the words 'Primary—Voted,' with the date of such primary under the same."

The qualified voters are defined in Article 2955** as every person twenty-one years of age who shall have been a citizen of the United States and have resided in the State one year next preceding the election and six months within the district or county where he offers to vote and who is not subject to the disqualifications of Article 2954, which include infancy, idiocy, pauperism, conviction of felony and membership in the military forces of the United States.

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* The list of voters eligible to vote at general elections is similarly prepared by the tax collector under Article 2975.

** Article 2955 was in its present form in 1923.

Section 2955 makes as a further necessary qualification for voting the payment of a poll tax, and the section concludes by providing:

> "The provisions of this article as to casting ballots shall apply to all elections, including general, special and primary elections."

The only limitation before that contained in the resolution of the Democratic Party upon the persons eligible to vote in primaries as listed by the county tax collector pursuant to Article 3121, is that contained in the test on the ballot set forth in Article 3110,* which reads as follows:

> "ART. 3110. *Test on ballot.* No official ballot for primary election shall have on it any symbol or device or any printed matter, except a uniform primary test, reading as follows: 'I am a..... (inserting name of political party or organization of which the voter is a member) and pledge myself to support the nominee of this primary'; and any ballot which shall not contain such printed test above the names of the candidates thereon, shall be void and shall not be counted."

It has been held by the Texas courts that except for the possible further limitations resulting from Article 3107 the test contained in Article 3110 is the sole test which may be applied to a participant in the primary whose name appears upon the tax collector's list.

> *Briscoe* v. *Boyle,* 286 S. W. 275, quoted with approval in *Love* v. *Wilcox,* 28 S. W. (2d) 515, 119 Tex. 256.
>
> *Westerman* v. *Mims,* 111 Tex. 29, 227 S. W. 178.
>
> *Clancy* v. *Clough,* 30 S. W. (2d) 569.
>
> *Friberg* v. *Scurry,* 33 S. W. (2d) 762.

In *Love* v. *Wilcox, supra,* the Supreme Court of Texas went into the history of Article 3110 and Article 3107 and

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* This article was Article 3096, Revised Statutes of 1911.

its predecessor, and it is clear that it did not deem Article 3107 to supersede Article 3110. With reference to Article 3107, the Court said (p. 522), by Greenwood, J.:

> "The committee's discretionary power is further restricted by the statute directing that a single, uniform pledge be required of the primary participants."

Thus neither voters nor candidates can be deprived of participation in primaries because they have previously violated their pledge of party loyalty, and the Court made it plain, at page 525, with respect to Article 3107, "that the Legislature intended the same qualifications to be prescribed by the State Committee for *all* participating in a party primary, whether as voters or candidates, and further that the same qualifications must be prescribed for all candidates." (Italics Court's.)

These sections illustrate how fully the State had occupied the field in determining who might vote at party primaries prior to the adoption of Article 3107 old and new.

The tax collector's list had to be used in order to make the primary election legal. Anyone on the list who made the test statement was authorized to vote. With that exception his qualifications were the same as those of voters in a general election. What is true in this respect as to voters is equally true of candidates in primaries (*Love* v. *Wilcox, supra*).

Where, then, was there room for the party to exercise inherent power to add to or whittle away the prerequisite qualifications of primary voters? If the judge of election had permitted anyone to vote at a primary whose name did not appear on the list of qualified voters of the precinct or who failed to present his poll tax receipt or certificate of exemption or to make an affidavit of its loss, the judge of election would have been subject to a fine of not exceeding $500 (Art. 216, *Texas Penal Code*, 1925).

There is no indication in this penal statute that the voting list could lawfully be enlarged by the political parties.

And *per contra,* if the judge of election had refused to receive the vote of any qualified elector who when his vote was objected to showed by his own oath that he was entitled to vote, such judge of election must be fined not to exceed $500 (Art. 217, *Texas Penal Code,* 1925).*

There is no suggestion here either that if the judge of election relied upon action of the party executive committee in restricting the list of eligible voters he would be immune from fine. Only in Article 3107 is there any suggestion in the law of Texas that parties can detract from the list of voters as certified by the tax collector:†

The power to eliminate Dr. Nixon from the primaries because of his color is traceable only to Chapter 67 of the Laws of 1927. That statute alone released the only force which could bar him from the primaries. The record shows that he was a citizen who had paid his poll tax and in every other respect was entitled to vote and that his name had been duly certified by the tax collector as a qualified voter (R. 1, 2). He thus automatically came within the provisions of Article 3121. He offered to take the pledge provided for in Article 3110. There was no justification, therefore, to deny him the right to vote, excepting that claimed under Chapter 67 of the Laws of 1927 and the resolution of the Democratic State Executive Committee, which was the issue of that statute. The un-

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* This penal provision is made applicable to primary as well as general elections by Article 231.

† Although there is no statute which penalizes a person for casting his primary ballot contrary to the terms of the resolution of the Democratic Party, the Court is referred to Article 236 of the *Texas Penal Code.* By the terms of this article, any person who votes in a primary election when he is not qualified to vote "at the next State, county or municipal election * * *" shall be fined "not exceeding five hundred dollars or be imprisoned in jail not exceeding sixty days or both." So that a person who is not entitled to be on the tax collector's list votes at his peril. This again illustrates that the fundamental basis of the right to vote is the right to be on the tax collector's list and not the resolution or mandate of the political party.

constitutional discrimination against the petitioner was consequently in direct sequence from the act of the Legislature.

II.

Even if a political party be a voluntary association, it is clear not only (a) that it is subject to the sovereignty of the State, but also (b) that it can become an instrumentality of the State.

To this effect is *Lawton* v. *Steele,* 152 U. S. 133, which held constitutional a statute of New York which authorized any person summarily to destroy certain nets in the waters of the State and provided that no action for damages should lie against any person on account of such seizure or destruction.

In that statute, as in Chapter 67 of the Laws of 1927 of Texas, there was nothing mandatory, nothing which required the individual in the one case or the political party in the other instance to act under the statute.

Just as in *Lawton* v. *Steele* the State had the power to vest private individuals with its police powers, so here the State could vest in political parties the power to determine party membership if that power did not involve discrimination by reason of race.

Other instances in which States have made private corporations or persons their agents are those in which they have vested authority in societies for the prevention of cruelty to children and animals.

See *Freund on Police Power,* Secs. 523, 527, 534.

In other fields, also, the State has vested its powers in individuals and corporations, the most noteworthy examples being in the field of condemnation.

Clark v. *Nash,* 198 U. S. 361.

Strickland v. *The Highland Boy Mining Co.*, 200 U. S. 527.

Offield v. *N. Y., N. H. & H. R. R. Co.*, 203 U. S. 372.

It is clear from these cases that a private individual, group or corporation can for certain purposes become an agency of the State vested with State powers, including the police power and the power to condemn private property.

There should be no difficulty in treating the respondents as judges of elections and the political parties themselves as the recipients of State powers.

That they are subject to the sovereignty of the State is clear from the Texas authorities cited on page 4, *supra*.

III.

The election laws define and limit in meticulous detail the principal functions of political parties. This exercise of sovereignty has deprived the parties of their independence of action.

There is no general definition of a political party in the Texas statutes. Nor is there any attempt to state the manner in which political parties may be created. It may be conceded that political parties in the common sense of the term have been associations of persons banded together to proclaim and achieve their political ideals, and political parties may exist without statutory authority and sometimes even without statutory control. Thus, for example, an organization such as the National Women's Party or a league of voters or a Blank for President Club may organize and make propaganda for their principles without State interference.

When, however, political parties come to the polls, when an organized effort is made to choose public officials through the State machinery of elections, political parties

have been subjected by the Texas Legislature to its sovereign control and defined in so far as concerned their functions and powers as a part of the electoral system. Thus, throughout the election laws certain duties are placed upon political parties, certain limitations of powers are prescribed, their government and organization are set forth, and their functions as a part of the electoral machinery of the State clearly established.

The principal functions of a political party are fivefold:

1. To select the social and political principles to the support of which the members dedicate themselves.
2. To select its officers and administration.
3. To select the candidates whom the party members wish to support at the general election.
4. To collect and expend moneys for campaign purposes.
5. To determine the membership of the party.

An examination of the Texas Election Laws reveals that the Legislature has taken steps to regulate every one of these principal functions. In each instance the Legislature has withdrawn sole control of these matters from the parties.

1. *Party platforms.*

By Article 3139 the time of holding State Conventions and the organization of such conventions "to announce a platform of principles" are provided for.

Article 3133 requires a referendum on all platform demands for specific legislation on any subject, the parties being prohibited in convention from placing such planks in their platforms "unless the demand for such specific legislation shall have been submitted to a direct vote of

the *people,* and shall have been endorsed by a majority of all the votes cast in the primary election of such party; provided, that the State executive committee shall, on petition of ten per cent. of the electors of any party, as shown by the last primary election vote, submit any such question or questions to the voters at the general primary next preceding the State convention." (Italics ours.)

2. *The selection of party officers and party administration.*

Article 2940 describes the persons who are disqualified from acting as chairman or members of any executive committee of a political party and from acting as judge, clerk or supervisor of any election.

The appointment of supervisors of general and primary elections is provided for in Articles 2939 and 2941. They must be qualified voters in the district and they are appointed by the chairman of the county executive committee for each political party that has candidates on the official ballot. Both the election officials, the county chairman and the members of the county executive committee of the political parties must have paid their poll tax, and the supervisors must have endorsed upon their certificate of nomination the approval of the county judge.

The judges of election at general elections must be of different political parties and selected by the Commissioners' Court* (Arts. 2937, 2938).

The presiding judges of primary elections must be chosen by the party county executive committee and such presiding judges must choose their associate judges and clerks. Judges, clerks and supervisors of primaries are all required to take the *"oath required of such officers in general elections"* (Art. 3104).

The time of holding primaries is provided for by statute (Art. 3102), except that "nominations of candidates to be

* The Commissioners' Court is composed of the county judge and county commissioners. Its duties are similar to those of county overseers and supervisors in other States (Arts. 2342 *et seq.*).

voted for at any special election shall be made at a primary election at such time as the party executive committee shall determine, but no such committee shall ever have the power to make such nominations."

The place where the primary vote is to be held is regulated by Article 3103.

The primary officials and the nature of their oath are prescribed by Article 3104.

The powers of judges of primaries are set forth in Article 3105.*

It is provided in Article 3109 that "the vote at all general primaries shall be by official ballot," and the contents of the official ballot and its printing by the county committee and the furnishing of the official ballot to the presiding officer of the primary are described in Article 3109.

The method by which the official ballot is made up by the primary committee, which is a subcommittee of the county committee in each county, is set forth in Articles 3111, 3113, 3114 and 3115.

The order of names on the ballot is prescribed (Art. 3117).

The manner of election of the county chairmen "by the qualified voters of the whole county," of the precinct chairmen by the qualified voters of their respective election precincts, and the other county party officers, is set forth in detail in Article 3118, and it is provided that "the list of election precinct chairmen and the county chairmen so elected shall be certified by the county convention to the county clerk along with the other nominees of said party."

The executive committee's responsibility for the distribution and general supervision of the supplies necessary for holding a primary is set forth in Article 3119.

The canvassing of the results is provided for in Article 3125; the delivery of the ballot boxes to the county clerk in Article 3128.

County and precinct conventions are also provided for (Art. 3134), district conventions (Art. 3135), State con-

* See Petitioner's Main Brief, discussion of authority vested in judges of election, pp. 36-39.

ventions (Arts. 3136, 3138, 3139), and the canvassing of primary returns by the State committee (Art. 3137).

Article 3141 sets forth the vote to which each county is entitled in the State or district conventions, to wit, one vote for each five hundred votes or major fraction thereof cast for the candidate for governor of the political party holding the convention, "at the last preceding primary election."

It is thus the "primary election" that determines, under the statute, the basis for representation in the very conventions of a party.

Even the provisions with respect to primary contests (Arts. 3146-3153) apply to selecting the delegates to the party conventions.

The Texas courts have held that the statutes are supreme with respect to the qualifications of candidates for party executive committee; that past disloyalty to the party cannot disqualify one seeking the position of executive committee member.

Clancy v. *Clough* (Tex. Civ. App.), 30 S. W. (2d) 569.

Friberg v. *Scurry* (Tex. Civ. App.), 33 S. W. (2d) 762.

In *Clancy* v. *Clough*,* *supra*, Pleasants, C. J., said at page 572:

> "The wisdom of our primary election statutes, which, in a large measure, *take away from political parties all control of the machinery by which they select their candidates for public office,* may well be doubted, but the authority of the Legislature to enact these statutes has been upheld by our courts, and *all primary elections are required to be held in accordance with the general provisions of these statutes, except as to matters which the statutes themselves leave to the discretion of some other authority.* These primary election statutes prescribe all the requisites of an application to have one's name placed upon the official ballot as a can-

* Cited with approval in *Love* v. *Wilcox*, *supra*.

didate, and the pledge to be placed on the ballot. Revised Statutes, arts. 3111 and 3110." (Italics ours.)

It would seem to follow inevitably that if a party is without inherent power to determine its internal organization or its platform, it cannot have inherent power as to the qualifications of voters.

3. *The selection of candidates.*

The provisions already referred to are for the most part applicable likewise to the selection of party candidates. To this effect are the cases cited *supra,* page 4.

Article 3111 specifically deals with the method by which candidates shall have their names placed upon the official ballot for a general primary election.

4. *Expenses of primaries.*

The expenses of the primaries and the division of the cost of the primary among the candidates are outlined in Article 3108, and it is provided in Article 3116 that no person's name shall be placed on the primary ballot unless he has paid the amount of the estimated expense for holding the primary which has been apportioned to him by the county committee.

An itemized statement of the candidate's expenses must be filed (Art. 3144).

Article 3145 requires a similar statement by every manager of any political headquarters or anyone expending money or giving property or promises of influence in aid of any candidate.

Chapter Eight, Title Six, of the *Texas Penal Code* deals with limitations on expenditures in primary elections and contains penal sanctions.

5. *Determination of party membership.*

As has already been stated, the Legislature, even before the adoption of Article 3093-a in 1923 and of the present Article 3107 by Chapter 67, Laws of 1927, had deter-

mined what the qualifications of primary voters were to be (*supra,* pp. 1-7). The qualified voters of the State as determined by Article 2955 were to be listed by the tax collector and such list was to be delivered to the primary officials pursuant to Article 3121. Delivery and use of such list at the primary election were the *sine qua non* of a legal primary election. This list was the basis of determining primary voters and all persons on that list were entitled to vote if they signed the test on the ballot as provided by Article 3110.

Briscoe v. *Boyle* (Tex. Civ. App.), 286 S.W. 275.*

Only the statute under consideration in this case gives to the party any authority over the primary voters.

It is apparent, then, that the Legislature has invaded the entire field of nomination of candidates by primary and otherwise. This sovereignty has been wielded pursuant to the requirement of Section 4 of Article VI of the Texas *Constitution,* which provides that the Legislature shall "make such other regulations as may be necessary to detect and punish fraud and preserve the purity of the ballot box."

It must be clear, therefore, that political parties in the State of Texas, however defined, in whatsoever manner or for whatever purpose they may come into being, have in their relation to primary and other elections only such powers, such duties and privileges, as the statutes give them. This does not mean that in respect to other functions and enterprises of the political party, such as its social activities and its charitable works, it need admit all qualified voters. With these matters the State has not expressed its concern. They are not necessarily or directly related to the expression of that popular will which is the basis of democratic government.

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* Cited with approval in *Love* v. *Wilcox, supra.*

IV.

The statute was principally aimed at Democratic Primaries.

Respondents on page 15 of their brief take exception to the statement in the footnote to petitioner's main brief on page 16 that "the Democratic Party, being the only party polling over 100,000 votes in Texas, was the only party required by law to hold primary elections."

While on two occasions, to wit, in 1926 and 1930, the Republican Party held primaries in the State of Texas because it polled over 100,000 votes in 1924 and 1928, nevertheless at the time of the adoption of Section 3107 in 1927 only the Democratic Party was required to hold a primary, and only the Democratic Party did hold a primary in the year 1928.

Counsel for petitioner have been informed by E. C. Toothman, Secretary and Director of Organization of the Republican Party in Texas, that in the 1926 primaries the Republicans polled 15,289 votes as against 821,234 votes cast in the first Democratic primary of that year and 766,318 votes cast in the Democratic run-off primary. In 1930 there were approximately 10,000 votes cast in the Republican primary, whereas in the Democratic primary 833,442 votes were cast and in the Democratic run-off primary of that year 857,773 votes were cast.

Even in those years when the Republicans held primary elections the real primary and the real election for State officials were in each instance the *Democratic* primary. It is the only possible inference from this that the legislative purpose in enacting Chapter 67, Laws of 1927, was to enable the Democratic State Executive Committee to eliminate Negroes from effective participation in elections, as the Legislature itself attempted to do in the void Act of 1923.

It is respectfully submitted that the judgment appealed from should be reversed, and the cause remanded for trial upon the merits.

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Supreme Court of the United States

OCTOBER TERM, 1931

No. 265

L. A. NIXON, *Petitioner*,

against

JAMES CONDON AND C. H. KOLLE, *Respondents.*

RESPONDENTS' BRIEF.

THORNTON HARDIE,
BEN R. HOWELL,
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Subject Index.

Page

PRELIMINARY STATEMENT 1

JURISDICTION 1

SUMMARY OF RESPONDENTS' ARGUMENT 2

POINT I—The Fourteenth and Fifteenth Amendments to the United States Constitution are a limitation only upon the power of a State, and do not affect private individuals or private associations of individuals 4

POINT II—The action of the Democratic Executive Committee in excluding the petitioner from voting at a Democratic primary was not an action of the State of Texas 5

(A) A political party has the inherent right to determine the qualifications of its own members ... 5

(B) The Statute enacted by the Texas Legislature in 1923, declared unconstitutional in Nixon v. Herndon, was void and did not operate to diminish the power already possessed by the Democratic Party to determine the qualifications of its own members 6

(C) The subsequent action of the Texas Legislature in enacting Chapter 67 of the Laws of 1927 did not affect this inherent power, except to limit it in two particulars, namely: former political views or affiliations and membership or non-membership in organizations other than a political party 8

Page

(D) By enacting Chap. 67 of the Laws of 1927 the Texas Legislature merely withdrew the State from an attempted unlawful interference with the right of the Democratic party to determine the qualifications of its members 10

(E) The Legislature by enacting Chap. 67 of the Laws of 1927 recognized a power which had long existed in the Democratic party to determine its membership and did not delegate such power to the party 10

(F) Respondents, Judges in the Democratic primary, were not officers of the State of Texas, and their action in denying petitioner a vote was not State action 13

POINT III—The Democratic primary involved was not an election of the people within the meaning of Sec. 31, Title 8 of the United States Code 15

POINT IV—The Fifteenth Amendment is a limitation only upon States, and the State did not deprive petitioner of his vote 16

CONCLUSION 16

Table of Cases.

	Page
Briscoe vs. Boyle, 286 S. W. 275	7
Buchanan vs. Warley, 245 U. S. 60	5
Carter vs. Texas, 177 U. S. 442	5
Child Labor Tax Case, 259 U. S. 20	13
Civil Rights Case, 109 U. S. 3	5
Corrigan vs. Buckley, 271 U. S. 323	5
Cunningham vs. McDermott, 277 S. W. 218	6
Ex Parte Virginia, 100 U. S. 339	5
Ex Parte Siebold, 100 U. S. 371	5
Ex Parte, Yarborough, 110 U. S. 651	5
Gibson vs. Mississippi, 162 U. S. 565	5
Giles vs. Harris, 189 U. S. 475	5
Grigsby vs. Harris, 27 Fed. (2d) 942	5, 6, 12
Guinn vs. U. S., 238 U. S. 347	5
Hodges vs. U. S., 203 U. S. 1	5
Home Tel. & Tel. Co. vs. Los Angeles, 227 U. S. 278	13
In re Kemmler, 136 U. S. 436	5
James vs. Bowman, 190 U. S. 127	5
Kearns vs. Hawley, 188 Pa. 116, 41 Atl. 273	6
Koy vs. Schneider, 110 Tex. 36, 218 S. W. 480, 221 S. W. 880	6
Love vs. Griffith, 266 U. S. 33	5
Love vs. Wilcox, 28 S. W. (2d) 515	8, 9, 12
McPherson vs. Blacker, 146 U. S. 1	5
Meyers vs. Anderson, 238 U. S. 369	5
Neil vs. Delaware, 103 U. S. 370	5
Nixon vs. Condon, 34 Fed. (2d) 464, 49 Fed. (2d) 1012	12
Nixon vs. Herndon, 273 U. S. 536	2, 5, 6, 8, 10

	Page
Phillips vs. Gallagher, 73 Minn. 528, 76 N. W. 285	6
Slaughterhouse Cases, 16 Wall. 36, 83 U. S. 36	5
Standard Scales Co. vs. Farrell, 249 U. S. 577	13
State vs. Kanawha County, 78 W. Va. 168, 88 S. E. 662	6
Stephenson vs. Board of Electors, 118 Mich. 396, 76 N. W. 914	6
Strauder vs. West Virginia, 100 U. S. 303	5
Swafford vs. Templeton, 185 U. S. 487	5
Texas Almanac, 1926, p. 19	15
Texas Almanac, 1931, p. 260	15
U. S. vs. Harris, 106 U. S. 629	5
U. S. vs. Doremus, 249 U. S. 86	12
U. S. vs. Reese, 92 U. S. 214	5
U. S. vs. Cruikshank, 92 U. S. 542	5
U. S. vs. Mosley, 238 U. S. 383	5
Virginia vs. Rives, 100 U. S. 318	5
Waples vs. Marrast, 108 Tex. 5, 184 S. W. 180	6
White vs. Lubbock, 30 S. W. (2d) 72	12
Wiley vs. Sinkler, 179 U. S. 58	5
Winnett vs. Adams, 71 Neb. 917, 99 N. W. 681	6
Yick Wo vs. Hopkins, 118 U. S. 356	5, 13

Provisions of Constitution.

Fourteenth Amendment	2, 4, 7, 10, 16
Fifteenth Amendment	2, 3, 4, 15, 16

Statutes.

U. S. C. A., Title 8, Sec. 31	2, 3, 15
Title 28, Sec. 41	1
Texas Revised Civil Statutes, 1925, Art. 3107 (Chap. 67, 1927 Session Laws)	3, 8, 9, 10

Supreme Court of the United States

OCTOBER TERM, 1931

No. 265

L. A. NIXON, *Petitioner,*

against

JAMES CONDON AND C. H. KOLLE, *Respondents.*

RESPONDENTS' BRIEF.

PRELIMINARY STATEMENT.

The statement of the nature of the suit, the pleadings, the decision in the District Court and the decision of the Supreme Court of Appeals contained in petitioner's Application for Writ and in petitioner's Brief is substantially correct. The record of the case is not long and respondents deem it unnecessary to make an additional statement.

JURISDICTION.

Petitioner states that jurisdiction is provided by Sec. 41, Title 28 of the United States Code, which gives to the Federal District Courts original jurisdiction over suits of a civil nature at common law or in equity where the amount in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00, and arises under the Constitution or laws of the United States. It is disputed by respondents that the matter in controversy arises under (1) the Fourteenth Amendment to the Constitution of the Unit-

ed States; (2) the Fifteenth Amendment to the Constitution of the United States; (3) Section 31, Title 8 of the United States Code. The argument which will be made by respondents on the merits covers the objection to the ground of jurisdiction under the Fourteenth and Fifteenth Amendments. Also the argument made on the merits will cover the objection made to jurisdiction under Section 31, Title 8 of the United States Code. We may here state that a reading of Section 31, Title 8 of the United States Code limits the right to vote, without distinction of race, color or previous condition of servitude, to an *election by the people.* The Democratic primary, involved in this case, was not an election by the people, but constituted a nomination for an election by the people. The decision in Nixon v. Herndon is not applicable as that decision was limited expressly to a case arising under the Fourteenth Amendment.

The same objection to the grounds of jurisdiction under the Fourteenth and Fifteenth Amendments applies to the Court taking jurisdiction under Subdivision 11 of Section 41 of Title 28 of the Judicial Code.

No conspiracy is alleged to give the Court jurisdiction under Subdivision 12.

Subdivision 14 is apparently based upon the Fourteenth Amendment and the objection to jurisdiction under this Section will be met by the same argument applying to the Fourteenth Amendment.

SUMMARY OF RESPONDENTS' ARGUMENT.

I. The Fourteenth and Fifteenth Amendments to the United States Constitution are a limitation upon the power of a state, and do not affect private individuals or private associations of individuals.

II. The action of the Democratic Executive Committee

in excluding the petitioner from voting at a Democratic primary was not an action of the State of Texas.

(A) A political party has the inherent right to determine the qualifications of its own members.

(B) The Statute enacted by the Texas Legislature in 1923, declared unconstitutional in Nixon v. Herndon, was void and did not operate to diminish the power already possessed by the Democratic Party to determine the qualifications of its own members.

(C) The subsequent action of the Texas Legislature in enacting Chap. 67 of the Laws of 1927 did not affect this inherent power, except to limit it in two particulars, namely: Former political views or affiliations, and membership or non-membership in organizations other than a political party.

(D) By enacting Chap. 67 of the Laws of 1927 the Texas Legislature merely withdrew the State from an attempted unlawful interference with the rights of the Democratic party to determine the qualifications of its own members.

(E) The Legislature by enacting Chap. 67 of the Laws of 1927 recognized a power which had long existed in the Democratic party to determine its membership and did not delegate such power to the party.

(F) Respondents, Judges in the Democratic primary, were not officers of the State of Texas, and their action in denying petitioner a vote was not State action.

III. The Democratic primary involved was not an election of the people within the meaning of Sec. 31, Title 8 of the United States Code.

IV. The Fifteenth Amendment is a limitation only upon states, and the State did not deprive petitioner of his vote.

I.

The Fourteenth and Fifteenth Amendments to the United States Constitution are a limitation only upon the power of a state, and do not affect private individuals or private associations of individuals.

Section 1 of the Fourteenth Amendment reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Fifteenth Amendment reads as follows:

> "Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> "Section 2. The Congress shall have power to enforce this article by appropriate legislation."

Both amendments have been construed by this Court to apply only to action by a State of the United States, in distinction from an action of a private individual or an association of private individuals.

Slaughterhouse Cases, 16 Wall. 36; 83 U. S. 36.[1]

This proposition is admitted by petitioner. In paragraph I of his argument he states the only question before this Court is whether the invasion of this interest and this classification were the result of State action.

II.

The action of the Democratic Executive Committee in excluding the petitioner from voting at a Democratic primary was not an action of the State of Texas.

(A) A political party has the inherent right to determine the qualifications of its own members.

We believe it is conceded by all parties that in the absence of any action by the State a political party has the inherent right to exclude from its membership any person or class of persons it may desire excluded. No one can question the right of men to organize a party of men and exclude women from its ranks; no one can question the right of women to organize a party of women and exclude men from its ranks; no one can question the right of a group of individuals to organize a political party with its membership based upon stature, color of the hair or color of the skin. It seems to be conceded in petitioner's brief that the

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1 See also:
United States vs. Reese, et al., 92 U. S. 214, 128; United States vs. Cruikshank, et al., 92 U. S. 542; Strauder vs. West Virginia, 100 U. S. 303; Virginia vs. Rives, 100 U. S. 318; Ex Parte Virginia, 100 U. S. 339; Ex Parte Siebold, 100 U. S. 371; Neil vs. Delaware, 103 U. S. 370; United States vs. Harris, 106 U. S. 629, 641; Civil Rights Cases, 109 U. S. 3; Ex Parte Yarbrough, 110 U. S. 651, 664; Yick Wo vs. Hopkins, 118 U. S. 356, 365, 370, 373; In re Kemmler, 136 U. S. 436, 438, 448; McPherson vs. Blacker, 146 U. S. 1, 23-25; Gibson vs. Mississippi, 162 U. S. 565, 579; Carter vs. Texas, 177 U. S. 442; Wiley vs. Sinkler, 179 (fol. 30) U. S. 58, 65; Swafford vs. Templeton, 185 U. S. 487, 491; Giles vs. Harris, 189 U. S. 475, 485; James vs. Bowman, 190 U. S. 127, 136; Hodges vs. United States, 203 U. S. 1, 15, 19; Guinn vs. United States, 238 U. S. 347, 354; Meyers vs. Anderson, 238 U. S. 369; United States vs. Mosley, 238 U. S. 383; Buchanan vs. Warley, 245 U. S. 60; Love, et al., vs Griffith, et al., 266 U. S. 33; Corrigan vs. Buckley, 271 U. S. 323, 330; Nixon vs. Herndon, 273 U. S. 536, 540; Grigsby vs. Harris (D. C., S. D. Tex.), 27 F. (2d) 942.

Democratic party, prior to 1923 when Art. 3093-A (the Statute involved in Nixon v. Herndon) was passed by the Texas Legislature, had the right to exclude the negro from membership in that party.

The Texas Supreme Court has drawn a clear distinction between the State and a political party, and has defined a political party. [2] *Waples vs. Marrast,* 108 Tex. 5, 184 S. W. 180.

(B) The Statute enacted by the Texas Legislature in 1923, declared unconstitutional in Nixon v. Herndon, was void and did not operate to diminish the power already possessed by the Democratic Party to determine the qualifications of its own members.

In Nixon v. Herndon this Court held unconstitutional the Act of 1923, which will be referred to in this brief as the "old statute and the present Article 3107 will be termed the "new statute." Both articles are set out in full in pe-

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2 "A political party is nothing more or less than a body of men associated for the purpose of furnishing and maintaining the prevalance of certain political principles or beliefs in the public policies of the government. As rivals for popular favor they strive at the general elections for the control of the agencies of the government as the means of providing a course for government in accord with their political principles and the administration of those agencies by their own adherents. According to the soundness of their principles and the wisdom of their policies they serve a great purpose in the life of a government. But the fact remains that the objects of political organizations are intimate to those who compose them. They do not concern the general public. They directly interest, both in their conduct and in their success, only so much of the public as are comprised in their membership, and then only as members of the particular organization. They perform no governmental agency. The purpose of their primary elections is merely to enable them to furnish their nominees as candidates for the popular suffrage. In the interest of fair methods and a fair expression by their members of their preference in the selection of their nominees, the State may regulate such elections by proper laws, as it has done in our general primary law, and as it was competent for the legislature to do by a proper act of the character of the one here under review."

See also: Koy vs. Schneider, 110 Tex. 369, 218 S. W. 480, 221 S. W. 880; Cunningham vs. McDermott, 277 S. W. 218; Winnett vs. Adams, 71 Neb. 917, 99 N. W. 681; State vs. Kanawha County, 78 W. Va. 168. 88 S. E. 662, 20 A. L. R. 1030; Stephenson vs. Board of Electors, 118 Mich. 396, 76 N. W. 914, 42 L. R. A. 214; Phillips vs. Gallagher, 73 Minn. 528, 76 N. W. 285; Kearns vs. Hawley, 188 Pa. 116, 41 A., 273, 42 L. R. A. 235; Grigsby vs. Harris, 27 Fed. (2d) 942.

titioner's brief and will not be copied here. An act of the State Legislature, which is repugnant to the Constitution of the United States, is void and is never effective, and affords no protection to a person acting thereunder. It is illegal and without force from its inception. By enacting the old statute the Texas Legislature attempted to interfere in the management of the Democratic party regarding membership or non-membership of negroes. We submit this attempt was never consummated, but failed from its inception because repugnant to the Fourteenth Amendment. If our reasoning is correct, it follows that the enaction of the old statute did not change or vary any right then held by the Democratic party to determine the qualifications of its members. As stated before it is apparently granted by petitioner that the right existed. How then could the passage of an unconstitutional act change or prejudice a right then in existence?

In petitioner's brief, on pages 21 to 26, inclusive, he argues that the State by the passage of the old statute took over the right theretofore had by the Democratic party to provide the qualifications of its members. In support of this statement he cites *Briscoe v. Boyle,* 286 S. W. 275, and emphasizes statements in that opinion to the effect that the Legislature has taken possession and control of the machinery of political parties so as to deprive the parties and their managers of all discretion in the manipulation of that machinery and quotes the Court as follows:

> "By excluding negroes from participating in party primary elections, and by legislating upon the subject of the character and degree of party fealty required of voters participating in such elections, the Legislature has assumed control of that subject to the exclusion of party action."

It is thus seen that in making this decision the Texas Court of Civil Appeals regarded the old Statute as being valid, and

based its decision to a large extent upon the existence of that old Statute. After the decision in Nixon v. Herndon, that basis vanished, and is now seen to have never existed. This decision falls when these facts are considered:

(C) The subsequent action of the Texas Legislature in enacting Chapter 67 of the Laws of 1927 did not affect this inherent power, except to limit it in two particulars, namely: former political views or affiliations and membership or non-membership in organizations other than a political party.

Chapter 67 of the Laws of 1927 is the new Statute now under consideration, and was passed after the old Statute was declared unconstitutional in Nixon v. Herndon. We believe our previous argument and authorities establish the fact that the inherent power to exclude Petitioner in this case existed in the Democratic Party from its inception and was not affected or diminished by the passage of the old Statute. In spite of Petitioner's theory that the Texas Legislature had taken this power from the party, we find, upon analysis that such taking, if any, existed solely by virtue of the new Statute. A reading of this Statute shows it to be a limitation placed upon the Party by the Legislature. This limitation prevents the Party, through its Executive Committee, from excluding any person,

> "because of former political views or affiliations, or because of membership or non-membership in organizations other than political party."

The Legislature has here limited the powers of the parties in these two particulars, and in these two particulars only.

The decision by the Texas Supreme Court in *Love v. Wilcox*, 28 S. W. (2d) 515, holds this limitation valid. Even if Love v. Wilcox be correct, nevertheless, the only limitation placed upon the party by this Act was in these two men-

tioned particulars. If we are correct in our belief that up until the time of the passage of the new Statute the inherent power still remained in the Party, then this new Statute merely restricted the power in the two specifications. The restriction was held valid in Love v. Wilcox. The decision in Love v. Wilcox is merely to the effect that this restriction has been made by the Legislature and is valid. The grounds of the decision in Love v. Wilcox, are limited by the words of the decision itself, wherein the Court says:

> "We are not called upon to determine whether a political party has power, beyond statutory control, to prescribe what persons shall participate as voters or candidates in its conventions or primaries. We have no such state of facts before us. The respondents claim that the State Committee has this power by virtue of its general authority to manage the affairs of the party. The statute, article 3107, Complete Tex. St. 1928 (Vernon's Ann. Civ. St. art. 3107), recognizes this gentral authority of the State Committee, but places a limitation on the discretionary power which may be conferred on that committee by the party by declaring that, though the party through its State Executive Committee, shall have the power to prescribe the qualifications of its own members, and to determine who shall be qualified to vote and otherwise participate, yet the committee shall not exclude anyone from participation in the party primaries because of former political views or affiliations, or because of membership or nonmembership in organizations other than the political party."

In the express language of the decision, the Court construes Article 3107 as a limitation and not a grant of power. It follows that if the effect of Article 3107 was merely to limit the power already had by the Democratic Party, and such Statute did not take away the right of the Party to exclude Petitioner because of his color; then, this right to exclude Petitioner because of his color rests in the Party, where it has always rested and where it is now undisturbed by the State of Texas.

We may here call attention to the fact that the previous decision of this court in Nixon v. Herndon does not control the decision of this case. In Nixon v. Herndon this court held that the Legislature of Texas may not pass an act excluding the negro from the primary of the Democratic party. Had the legislature attempted by statute to exclude the negro from the Masonic Lodge, the Baptist Church, or any organization having no connection with political parties, such an act would have been in violation of the Fourteenth Amendment and void. Therefore, an entirely new situation is here presented, not controlled by Nixon v. Herndon. The very fact which appeared of record as true in Nixon v. Herndon—that the State of Texas had itself excluded the negro—is here the question before the court.

(D) By enacting Chap. 67 of the Laws of 1927 the Texas Legislature merely withdrew the State from an attempted unlawful interference with the right of the Democratic party to determine the qualifications of its members.

(E) The Legislature by enacting Chap. 67 of the Laws of 1927 recognized a power which had long existed in the Democratic party to determine its membership and did not delegate such power to the party.

In petitioner's brief, he states that the Legislature could not recognize the inherent power, because no inherent power was in existence after the State had exercised sovereignty over the right. We have just shown that the State had not exercised its sovereignty, but had merely attempted to do so. Petitioner follows with the statement that whether this be regarded as the creation of a new power or the recognition and restoration of an old one, the existence of the power itself would be necessarily and wholly dependent upon the force of the statute and hence would be a statutory power,

not an inherent one. We find therein no authorities to support this remarkable statement. We do not conceive it possible that because the State enacts a void law, one beyond its power to enact, it cannot then withdraw from the field which it attempted to usurp and leave that field in the condition in which it previously existed. If petitioner is correct in this reasoning, then every law repealed by the State has the effect of being a grant of power by the State. The citizens relieved of burdens by the repeal owe the right to transact their affairs in the same fashion as before to a statutory power. As an example, should the State enact a law requiring the directors of all corporations in the State to hold their meetings in the State Capitol, the repeal of that law by the State, is a grant of power by the State to the directors. If petitioner is correct in his statement, then every meeting held after the repeal of the law is derived from force of the statute and a statutory meeting.

Petitioner further argues that because the Texas statutes regarding the conduct of primary elections recognize in the Executive Committee the right to perform certain functions which the party has always performed, it is an expression of legislative intention which turns a private affair into a State affair. Petitioner contends that recognition by the Legislature of the power of the Democratic party to determine its own membership deprives the party of that right. If this be true, then all that is needed to turn every church in the State of Texas into an agency of the State is for the Legislature to pass an act stating that each church may make such requirements as it sees fit for membership in that church. The enactment of such a statute would prevent a church congregation, a lodge, or any other group from excluding the negro. Every action of that church or lodge would be State action—if petitioner is correct.

Every court which has passed upon the statute in ques-

tion has construed it to be a withdrawal by the State and a recognition of the party's rights by the State.

Nixon v. Condon, 34 Fed. (2d) 464, 49 Fed. (2d) 1012,
Love v. Wilcox, 28 S. W. (2d) 515,
White v. Lubbock, 30 S. W. (2d) 72,
Grigsby v. Harris, 27 Fed. (2d) 972.

We refer the Court particularly to the opinion of Judge Hutcheson in Grigsby v. Harris.

Petitioner devotes considerable argument to the effect that the emergency clause attached to the new statute shows of itself the intent by the Legislature to deprive petitioner of membership in the Democratic party by legislation. Aside from the fact that in this day of crowded legislative hoppers, every bill introduced in the Texas Legislature has a similar emergency clause attached, the language of the bill shows no intent to achieve such result. The previous action of the legislature in passing an unconstutional act, unlawfully invading the right of the Democratic party to manage its affairs, created a public necessity that the State withdraw its unlawful interference. It is only reasonable for any state to regard the removal of unconstitutional legislation as an emergency. This Court has previously looked at the language of a statute itself to determine its validity, and disregarded the fact that an additional result may be accomplished. In *United States v. Doremus*, 249 U. S. 86, 39 Sup. Ct. 214, 63 L. Ed. 493, this Court said, "An act may not be declared unconstitutional because its effect may be to accomplish a purpose in addition to tax." In the Doremus case, the Court analyzed the statute, and held that the statute did not show on its face any unconstitutional regulation. The statute now under consideration certainly shows on its face no purpose by the State to exclude the negro.

A study of cases adduced by petitioner shows that in

Yick Wo v. Hopkins, 118 U. S. 356, and in every case cited by him in connection therewith, no question was raised that anyone but the public authorities was applying the statute. The effect of Yick Wo v. Hopkins is limited by the opinion to application of laws by the public authorities charged with their administration. In *Standard Scales Company v. Farrell,* 249 U. S. 577, an Inspector of Weights and Measure, clearly a State Officer, was involved. *Home Telephone & Telegraph Company v. Los Angeles,* 227 U. S. 278, involved the order of a municipal commission exercising power as an instrumentality of the State.

In the *Child Labor Tax case,* 259 U. S. 20, this Court examined the statute in question and held, "The purpose to regulate child labor follows from enforcement of the statute itself, is apparent and is not dependent upon the acts of individuals." It was not necessary to show any facts in addition to the language of the statute itself to show the purpose. Petitioner is now trying to make that decision apply to a statute that does not show on its face any unlawful purpose. We believe the decision in the Doremus case disposes of his contention.

In order to sustain petitioner's theory it is necessary to presume that the State intended to exceed its authority, to presume that the State delegated to the Committee powers which it already possessed, to presume that the Committee was an agent of the State, without which presumptions, petitioner's theory cannot be sustained. On the contrary, withdrawal of interference by the State leaves the power in the original resting place, the Democratic party.

(F) Respondents, Judges in the Democratic primary, were not officers of the State of Texas, and their action in denying petitioner a vote was not State action.

Our preceding argument applies with equal force to this statement. The record shows that the judges are not paid by the State, but by the party; are not selected by the State, but by the party. It is true that their duties are regulated in many details by the statutes. However, regulation to insure fair primaries does not necessarily mean that the party officers become State officers. Texas, in common with many other States, has proscribed many and detailed regulations for the conduct of private corporations. The State has limited the purposes for which corporations may be organized, has required a charter from the State, has placed a minimum upon the number of incorporators, has declared that fifty per cent of the capital stock must be paid in cash, and all the stock subscribed; has provided that married women may become stockholders free from the usual disabilities of coverture; has prescribed certain powers; has provided for the election of officers; has prescribed the powers of directors; has required a record to be kept of all stock; has required the payment of dividends in certain cases; has regulated the voting by stockholders; has prohibited a corporation from contributing funds to the election or defeat of any political candidate, any political campaign, or any question to be decided by the voters; has limited the issuance of stock; has directed the principal office to be in Texas; has limited the purchase of lands; has provided for examination of the corporate books by the Attorney General; has provided for dissolution; and has enacted laws limiting the conduct of corporations in infinite detail. Yet no one seriously contends that a private corporation is the agent of the State. No one claims that the corporate officers are officers of the State. Mere regulation does not create an adoption by the State. If petitioner is correct in declaring that the Legislature has made the Democratic Executive Committee and the primary judges officers of the State, then it has made every corporate officer an officer of the State. He contends that

the selection and terms of the members of the Executive Committee is regulated by the State. If this regulation results in the creation of State officers, then so does the regulation of corporations create State officers.

Petitioner states in several places that the Texas primary laws apply only to the Democratic party. He is mistaken in this assertion. (Page 36, Petitioner's Points). Art. 3101 applies the primary laws to all parties which cast more than 100,000 votes at the last election. In 1924, the Republican Candidate Butte polled 294,970 votes against the Democrat Ferguson's 422,558. In 1928, Republican Presidential electors were elected by Texas, and Holmes, the Republican candidate for Governor received 120,504 votes. [3] It thus appears that petitioner is misaken in his various statements to the effect that this Statute applies and has always applied only to the Democratic party. His argument regarding the legislative intent loses considerable force when the correct facts are known.

III.

The Democratic primary involved was not an election of the people within the meaning of Sec. 31, Title 8 of the United States Code.

Petitioner claims as ground for jurisdiction that the case arises under Sec. 31, Title 8, U. S. C. A. This section was passed by Congress on May 31, 1870, and states that "all citizens of the United States, who are otherwise qualified by law to vote at any election *by the people* in any state, etc., shall be entitled and allowed to vote * * *." Apparently this Section is based upon the Fifteenth Amendment and shows Congressional intent as to the meaning of the Fifteenth Amendment, the amendment and the statute

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3 1926 Texas Almanac, p. 19. 1931 Texas Almanac, p. 260.

being passed at almost the same time. We thus see the Congressional intent regarding the vote contemplated by the Firteenth Amendment. By statute Congress has limited this right to vote to an election of the people. A party nomination is not an election of the people, but is merely the choosing of a candidate by that party, and conquently petitioner fails to show jurisdiction under this section or to state any cause of action against respondents under the statute.

IV.

The Fifteenth Amendment is a limitation only upon states, and the State did not deprive petitioner of his vote.

We have heretofore presented our contention that the Fourteenth Amendment is a limitation only upon the power of a state, and that no state action is involved in this case. The Fifteenth Amendment is likewise limited to action by a state. The same rules of construction apply and the same arguments that we advanced in discussing the Fourteenth Amendment apply with equal force to the Fifteenth Amendment. We shall not repeat or recount these arguments

Petitioner claims his right to vote was abridged even if not denied. Unless this right was abridged by the State petitioner has stated no cause of action.

We submit that the foregoing argument shows that no action of the State denied or abridged petitioner's right to vote.

CONCLUSION.

We may summarize our argument briefly to the effect that the issue in this case is whether or not action by the State is involved. We have shown that the Democratic party has always possessed power to do the thing complain-

ed of by petitioner. That the State's attempted interference was unconstitutional and void, leaving this power where it had always been. The statute in question did not consist of a grant of any new power, but was either a limitation in regard to two particulars upon the power of the committee, a withdrawal by the State from an unauthorized field of activity, or a recognition of power in the committee which already existed. In either event the committee did not rely upon the State for its power exercised in this case. We do not deign to answer the threat in petitioner's conclusion that the disenfranchised are fruitful soil for communist propaganda, as we do not think this Court will be influenced by such statements.

It is respectfully submitted that the judgment appealed from should be affirmed.

THORNTON HARDIE,
BEN R. HOWELL,
Counsel for Respondents.

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Supreme Court of the United States

OCTOBER TERM, 1931

No. 265

L. A. NIXON,

Petitioner,

against

JAMES CONDON and C. H. KOLLE,

Respondents.

MOTION FOR LEAVE TO FILE BRIEFS AND ARGUE CASE

J. ALSTON ATKINS,
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Attorneys for Movants.

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NABRIT, ATKINS and WESLEY
Of Counsel

INDEX

	PAGE
MOTION FOR LEAVE TO FILE BRIEFS	1
The Movants	1
Grounds of the Motion	3
CERTIFICATE OF COUNSEL	6
BRIEF FOR MOVANTS	7
Preliminary Statement	7
Jurisdiction	7
Grounds on Which Writ is Sought	7
ARGUMENT:	
(A) Upon the first ground upon which the writ is sought, namely, that the decision of the Circuit Court of Appeals in this case is in conflict with applicable decisions of this Court, movants submit the following additional argument:	7
POINTS:	
1. The Petitioner, L. A. Nixon, had the same right to vote in the primary election involved in this case that he did in the general election	8
2. (a) Whatever power the State Democratic Executive Committee had in the premises, it got from Article 3107 of the Revised Civil Statutes of Texas	9
History of Power Reviewed	9
(b) Assuming that the question in this case is one of party membership, which we deny, in the very nature of the Democratic Party, no State Committee has the power to prescribe qualifications for membership	11

PAGE

(c) The State Democratic Executive Committee in this case has not in fact undertaken to fix the qualifications of members of the Democratic Party 11

8. The resolution of the State Democratic Executive Committee is no defense to this suit for damages for the wrong done to plaintiff in denying him his legal right to vote in the statutory primary 11

It is not necessary that defendants be held to be state officers or that the Federal questions involved be decided in favor of petitioner, it being sufficient that the Federal questions are substantial 13

ARGUMENT:

(B) Upon the second ground upon which the writ is sought, namely, that the decision of the Circuit Court of Appeals in this case is in conflict with a decision of another Circuit Court of Appeals upon the same matter, movants submit the following additional argument 14

POINTS:

1. A State Law, which recognizes an unconstitutional classification is just as repugnant to the Federal Constitution as a State Law which creates such unconstitutional classification 14

The State of Texas at least recognizes the power to exclude Negroes from the statutory primaries 14

The State of Texas protects this exclusion 14

PAGE

In every case, except where Negroes are excluded, the Appellate Courts of Texas have denied the power of party committees to fix qualifications for participation in the statutory primaries 15
By judicial construction, the State of Texas has re-created the statute held unconstitutional in Nixon v. Herndon 16
CONCLUSION 16

CASES CITED

Bailey v. Alabama, 219 U. S. 219 16
Bliley v. West, 42 Fed. (2nd) 101 15
Chicago v. Kendall, 266 U. S. 94 13
Civil Rights Cases, 109 U. S. 3 12
Clancy v. Clough, —Tex.—, 30 S. W. (2nd) 569 16
Dred Scott v. Sandford, 19 Howard 393 3
Greene v. Ry. 244 U. S. 499 13
L. and N. Railway vs. Garrett, 231 U. S. 298 13
Love v. Griffith, 266 U. S. 32 ..... 2, 3
Love v. The Democratic Executive Committee, No. 438 Equity U. S. District Court for Southern District of Texas 2, 3
Love v. Wilcox —Tex.—, 28 S. W. (2nd) 515 ..... 9, 15, 16
Nixon v. Condon et al. 49 Fed. (2nd) 1012 ..... 8, 14
Nixon v. Herndon, 273 U. S. 536 ..... 4, 5, 8, 10, 12, 14
Northern Securities Co. v. United States, 191 U. S. 555, 48 L. ed. 299 5
Quong Wing v. Kirkendall, 223 U. S. 59 4
Siles v. L. and N. Railway, 213 U. S. 298 13
West v. Bliley, 33 Fed. (2nd) 177 15
White v. Lubbock, —Tex.—, 30 S. W. (2nd) 722 ..... 2, 14

PAGE

REFERENCES TO CONSTITUTION

Constitution of the United States:
Fourteenth Amendment 14, 15
Fifteenth Amendment 14, 15

TEXAS STATUTORY REFERENCES

Article 3002, Revised Civil Statutes of Texas 14
Article 3105, Revised Civil Statutes of Texas 14
Article 3107, Revised Civil Statutes of Texas 9, 10, 11
Article 3110, Revised Civil Statutes of Texas 11, 16

Supreme Court of the United States

OCTOBER TERM, 1931

No. 265

L. A. NIXON,

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JAMES CONDON and C. H. KOLLE,

Respondents.

MOTION FOR LEAVE TO FILE BRIEFS AND ARGUE CASE

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

C. N. Love, Julius White, The Houston Informer and Texas Freeman, individually and on behalf of all other Negroes in the City of Houston, in Harris County, and the State of Texas, who are not otherwise represented, hereby respectfully move this Honorable Court for leave to file a brief in support of the petition for writ of certiorari on file herein —a copy of which brief is hereto attached—and also for leave to file a brief and to argue the case upon the merits, in the event said petition for writ of certiorari is granted. In support of this motion your movants show:

The Movants

1. Your movant, C. N. Love, is a natural born citizen and resident of the State of Texas, and of the United States, is sixty-eight (68) years of age, is an American Negro; has resided in the City of Houston, Harris County, State of Texas, for sixty-six (66) years; and he is the owner of property and pays taxes thereon to said city, county and state.

Your said movant is a duly qualified elector and voter under the laws of the State of Texas and the United States, is a member of the Democratic Party, and is an adherent to the tenets of the Democratic Party.

Your said movant is the same C. N. Love, who was the appellant in this Court in the case of Love v. Griffith, 266 U. S. 32, where this Honorable Court declined to pass upon the merits of the case because the questions involved in the case, identical with the questions here, had become moot.

Your said movant is also the same C. N. Love who was plaintiff in the case of Love v. The Democratic Executive Committee of the City of Houston, Texas, et al., before the United States District Court for the Southern District of Texas, Houston Division, Numbered 438 in Equity, and involving the identical issues involved in Love v. Griffith, supra; which case was decided adversely to your movant on January 23, 1931, and which was not appealed, because, under Love v. Griffith, supra, decided by this court, no relief could have been granted on appeal because the questions involved would have been moot before the appeal could have been decided.

2. Your Movant, Julius White, is a natural born citizen of the United States and of the City of Houston, County of Harris, and State of Texas; is 43 years of age; is an American Negro; is a duly qualified elector and voter under the laws of the State of Texas and the United States; is a member of the Democratic Party and an adherent to the tenets of the Democratic Party; and is the owner of property in, and pays taxes thereon to said city, county and state.

Your said movant is president of the Harris County Negro Democratic Club, and is the same Julius White who was the relator in the case of White v. Lubbock, 30 S. W. (2nd) 722, where the Court of Civil Appeals at Galveston, Texas, in a case in which it was the Court of last resort, decided the identical questions involved in the instant case adverse-

ly to your movant. No attempt was made to have this court review said case because, under Love v. Griffith, supra, decided by this Court, no relief could have been granted because the questions involved would have become moot before such review could have been had.

3. Your movant, The Houston Informer and Texas Freeman, is a Negro weekly newspaper, published at Houston, Texas, dedicated to the progress and uplift of Negroes of Texas, with a wide circulation among the nearly million Negroes of that State. Your said movant has been especially interested in the elective franchise as it pertains to the Negroes of Texas, and by reason thereof, bore all of the expenses in connection with the case of Love v. The Democratic Executive Committee of the City of Houston, Texas, et al., supra, before the United States District Court for the Southern District of Texas, at Houston.

Grounds of the Motion

The grounds on which this motion is based, are as follows:

1. In the opinion of movants this is one of the most important cases, so far as the nine million Negroes of the South are concerned, that has been before this Honorable Court since the famous case of Dred Scott v. Sandford, 19 Howard 393. The device which has been created by the white majority through the exercise of the sovereign power of the State of Texas, and which is sought to be invalidated in this case, has effectively disfranchised approximately one-sixth of the total population of the entire State of Texas. It has jeopardized the lives of this huge population by depriving Negroes of adequate police protection, it has threatened the educational system for Negroes and placed the public school facilities for thousands of Negro children upon a basis of favor and discretion; it has kept thousands of tax-paying Negro citizens from representation in the expenditure of millions of dollars of their own

money; it has put millions of dollars of property and more than 800,000 lives in a state where rights and liberties yield to permission and tolerance, outside of the pale and protection of the strong sustaining arm of the laws and regulations of the State of Texas; and by reason thereof, the questions involved in this case are of such momentous import that your movants respectfully submit that every reasonable argument and point of view should have a hearing before the matter is finally determined by this Court.

2. Should this Court decide the questions involved in this case adversely to the petitioner, L. A. Nixon, not only he, but the 854,964 Negroes of the State of Texas, will be perpetually denied the right to vote, and, your movants respectfully submit that every Negro in the State of Texas, who has any reasonable argument and point of view to advance should have an opportunity to be heard in the attempt to prevent such a catastrophe.

3. In the opinion of your movants, there are reasonable arguments and points of view upon the questions involved in this case—as appears from the brief hereto attached —which have not otherwise been called to the attention of this Court, but which, your movants believe the Negroes of Texas are entitled to have this Court consider.

Here your movants are mindful of the opinion written by Mr. Justice Holmes in the case of Quong Wing v. Kirkendall, 223 U. S. 59, in which at page 64, he said: "There are many things that courts would notice if brought before them that beforehand they do not know."

4. The request of movants in this case is supported by precedent in this Court. In the case of Nixon v. Herndon, infra, this Court permitted a brief to be filed on behalf of the Attorney General of the State of Texas. In that case, Mr. Justice Holmes said:

> "Here no argument was made on behalf of the defendants, but a brief was allowed to be filed by the

Attorney General of the State."

Nixon v. Herndon, 273 U. S. 536, 540.

Your movants believe that the Negroes who are disfranchised by the device sought to be invalidated in this case have more interest in the outcome of this case than the State of Texas did in the Nixon Case, for there, although taking enough interest in the matter to file a brief, it was vigorously argued in such brief by the State of Texas that the wrong complained of was not a state affair. It is interesting to note that while denying Texas has anything to do with excluding Negroes from the statutory primary, yet the State gives the full force of all its sovereign powers in recognizing and protecting defendants in such exclusion. If this case should sustain the device sought to be invalidated, your movants will suffer direct and irreparable loss.

5. In the event that the prayer of this motion should be denied to movants, they request in the alternative that the attorneys for movants be permitted to file such briefs and argue the case as amici curiae. This, your movants submit, may be done within the discretion of this Court. In Northern Securities Co. v. United States, 191 U. S. 555, 48 L. ed. 299, speaking of the power of this court to allow the appearance of amicus curiae, it is said:

> "And doubtless it is within our discretion to allow it in any case when justified by the circumstances."

Your movants feel that the circumstances justify such allowance in this case.

WHEREFORE, premises considered, your movants pray that this Honorable Court grant them leave to file a brief in support of the petition for writ of certiorari, and also to file a brief and argue the case upon the merits, in the event that such petition is granted; and in the alternative your movants and their attorneys pray that, if for any reason, the above prayer of your movants is not granted, in that event that the attorneys for your movants be given leave

to file such briefs and make such argument as amici curiae.

Dated September 12, 1931.

C. N. LOVE
JULIUS WHITE
THE HOUSTON INFORMER AND TEXAS FREEMAN
By G. H. WEBSTER, President
J. ALSTON ATKINS
One of Attorneys for Movants
Office and Post Office Address
409 Smith Street, Houston, Texas.

THE STATE OF TEXAS
COUNTY OF HARRIS

Before me, the undersigned authority, on this day personally appeared C. N. Love, Julius White, G. H. Webster, and J. Alston Atkins, who, having been by me first duly sworn, on their oaths, depose and say:

That they are the identical persons who executed the within and foregoing motion, and that the allegations therein set forth are true, according to their best knowledge and belief.

Subscribed and sworn to before me this the 12th day of September, A. D. 1931.

LELAND D. EWING
Notary Public in and for Harris County, Texas.

My commission expires June 1, 1933.
SEAL

Certificate of Counsel

I hereby certify that in my opinion the foregoing motion for Leave to File Briefs and Argue Case is well founded in law, and is filed in good faith and not for delay.

J. ALSTON ATKINS
One of Attorneys for Movants.

Supreme Court of the United States

OCTOBER TERM, 1931

No. 265

L. A. NIXON,

Petitioner,

against

JAMES CONDON and C. H. KOLLE,

Respondents.

BRIEF OF MOVANTS ON MOTION FOR LEAVE TO FILE BRIEFS AND ARGUE CASE

Preliminary Statement

The preliminary statement in the brief of the petitioner for the writ of certiorari is adequate in the opinion of the movants, upon the application for the writ, but, in the event that the writ is granted and movants are also given leave to file a brief on the merits, movants may there enlarge upon such statement.

Jurisdiction

Movants believe that the jurisdiction of this court is adequately laid for purposes of the application for the writ, but might be enlarged upon in a brief upon the merits.

Grounds on Which Writ of Certiorari Is Sought

In the opinion of movants, petitioner clearly brings himself within the enumerated cases in the Rules of this Court in which the Court in its discretion will grant the writ, and no further statement seems necessary upon this matter.

Argument

A.

Upon the first ground upon which the writ is sought, namely, that the decision of the Circuit Court of Appeals in this case is in conflict with applicable decisions of this Court, movants submit the following additional argument:

Point 1

The petitioner, L. A. Nixon, had the same right to vote in the primary election involved in this case that he did in the general election.

This was determined by this Court in Nixon v. Herndon, 273 U. S. 536, and is conceded by the Circuit Court of Appeals in the instant case. On this point, the Court said:

> "It is of course to be conceded, since the decision in Nixon v. Herndon, supra, that the right of a qualified citizen to vote extends to primary elections as well as to general elections."
>
> Nixon v. Condon, et al.
> 49 Fed. (2nd) 1012, 1013.

Conceding this much, the Circuit Court of Appeals based its decision not upon the absence of such legal right, but squarely upon the proposition that the State of Texas was not infringing that right. The court, distinguishing Nixon v. Herndon, supra, said:

> "The distinction between appeallants' cases, the one under the 1923 statute and the other under the 1927 statute, is that he was denied the permission to vote in the former by state statute, and in the latter by resolution of the State Democratic Executive Committee."
>
> Ibid. 1013.

Holding that the State Democratic Executive Committee was not exercising state power in passing the resolution in question, the Circuit Court of Appeals in the instant case said:

> "A political party is a voluntary association, and as such has the inherent power to prescribe the qualifications of its members. The act of 1927 was not needed to confer such power; it merely recognized a power that already existed."
>
> Ibid. 1013.

This brings us to the questions:

1. What was the source and nature of the power exercised by the State Democratic Executive Committee in passing the resolution here complained of?

2. If this power was not created by state statute, is a state statute constitutional which recognizes and enforces as legal the power of private individuals to deprive persons of a legal right, which the state itself is without power to deny by direct enactment?

Point II

(a) Whatever power the State Democratic Executive Committee had in the premises it got from Article 3107 of the Revised Civil Statutes of Texas.

We are not at this moment concerned with what power the Democratic Party had. We shall attempt first to show that whatever may have been the power of the Democratic Party, the State Democratic Executive Committee had no power prior to the passage of said Article 3107 to pass the white primary resolution.

In the case of Love v. Wilcox, 28 S. W. (2nd) 515, beginning at page 523, the Supreme Court of Texas gives the history of the power of party committees to fix qualifications for participation in the statutory primaries of the State of Texas. Speaking of this power at the inauguration of the statutory primary, the Court says:

> "The initial 1903 regulation by statute of party primaries in Texas authorized the county executive committee of the party holding a primary to prescribe additional qualifications for primary participation." ("Additional" to those fixed by statute.)

After reviewing the history over a period of twenty years of the above provision, the court said:

> "The Second Called Session of the 38th Legislature in 1923 amended the statute, which since 1903 had conferred power on the county executive committee to prescribe additional qualifications for primary voters, so as to direct that 'all qualified voters

under the laws and constitution of the State of Texas, who are bona fide members of the Democratic party, shall be eligible to participate in any Democratic Party primary election, provided such voter complies with all laws and rules governing party primary elections; however, in no event shall a Negro be eligible to participate in a Democratic party primary election held in the State of Texas.'

"The amendment of 1923 was declared unconstitutional by the Supreme Court of the United States. Nixon v. Herndon, 273 U. S. 536, 47 S. Ct. page 446, 71 L. Ed. 759. The 40th Legislature at its First Called Session, in 1927, repealed the 1923 amendment, and enacted what is now Article 3107 in Texas Complete Statutes of 1928 * * * " (Which is the statute sought to be invalidated in this case.)

Ibid. 523-524.

Thus, it will be seen that from the first enactment of the statutory primary in 1903, down to 1928, the state had, in the words of the Supreme Court of Texas, "conferred power on the county executive committee to prescribe additional qualifications for primary voters," that is, "additional" to those fixed by the statutes themselves.

From 1923 to 1927, the statute itself fixed the qualifications, but excluded Negroes by direct enactment.

It was not until the act of 1927 was passed by the Texas Legislature (because "an emergency and an imperative public necessity" had been created by Nixon v. Herndon, supra) that the State Democratic Executive Committee got whatever power it had to pass the resolution involved in this case.

Movants respectfully submit that it is strained to say that the State Democratic Executive Committee had "inherent power" to do this in the face of the history of the power of party committees to fix qualifications, as set out by the Supreme Court of Texas. It is also true that the State Democratic Executive Committee never sought to

fix such qualifications prior to the passage of the 1927 act.

(b) Assuming that the question in this case is one of party membership, which we deny, in the very nature of the Democratic Party no state committee has the power to prescribe qualifications for membership.

An absurdity will demonstrate this. If the State Democratic Executive Committee of Texas has power to say who may be Democrats, it can say that no Justice of the Supreme Court of the United States can be a Democrat? Would such a pronouncement be a determination by the Democratic Party?

The truth in this case is:

1. That there has been no action by the Democratic Party in the matter, the party being a national organization, which can settle such matters of policy only by its national conventions and committees.

2. That the real question involved in this case does not involve party membership, but the legal right to participate in a Texas statutory primary election, and whether the defendants may legally infringe such right.

(c) The State Democratic Executive Committee in this case has not in fact undertaken to fix the qualifications of members of the Democratic Party.

The resolution says no more than "That all white Democrats who are qualified under the Constitution and laws of Texas and who subscribe to the statutory pledge provided in Article 3110, Revised Civil Statutes of Texas, and none other" may vote in the statutory primary election.

The resolution makes no attempt to say who shall be Democrats, but rather what Democrats may exercise their legal rights and what Democrats shall be deprived of their legal rights.

Point III.

The resolution of the State Democratic Executive Com-

mittee is no defense to this suit for damages, for the wrong done to plaintiff in denying him his legal right to vote in the statutory primary.

That plaintiff had a legal right to vote in the primary election has been settled by this court in Nixon v. Herndon, supra, and that much is conceded by the Circuit Court of Appeals in this case.

That the action of defendants in denying plaintiff this right was a wrong has been settled by this court in Nixon v. Herndon, supra.

That a state statute authorizing the deprivation would be no defense is settled by Nixon v. Herndon, supra.

Assuming that the State Democratic Executive Committee was not exercising state power in passing the resolution here involved, which we deny, could it as a group of private individuals give legal immunity to the defendants in doing an act which would otherwise be a legal wrong? If so, that is a new principle in legal jurisprudence, and means, when applied elsewhere, that all one private individual would have to do to avoid liability for the infringement of the legal rights of another individual would be to have still a third individual execute a resolution justifying the infringement. In this connection a quotation from the opinion of Mr. Justice Bradley, in the Civil Rights Cases, 109 U. S. 3, is pertinent:

> "In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some

way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress. An individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls or slander the good name of a fellow citizen; but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefor to the laws of the State where the wrongful acts are committed."

The Federal Courts have full authority to enforce those State laws in cases of which they have jurisdiction. A substantial Federal question is sufficient to confer that jurisdiction.

Chicago v. Kendall, 266 U. S. 94.
Greene v. Ry. 244 U. S. 499.

The Federal questions raised in this case are at least substantial.

If a substantial Federal question is present, the court has power to pass on all questions in the case and to grant whatever relief that plaintiff may be entitled to have, whether State or Federal; and this is true even though the court may decide the Federal questions against the plaintiff or not decide them at all.

Siles v. L. and N. Railway, 213 U. S. 175, 191.
L. and N. Railway v. Garrett, 231 U. S. 298, 304.

In this view whether the defendants who committed the wrong, or the State Democratic Executive Committee, which authorized defendants to commit the wrong, are state officers would be immaterial. At any rate the de-

fendants in this case have the same character that the defendants did in Nixon v. Herndon, supra. In both cases, they were judges of a Texas statutory primary election.

B.

Upon the second ground upon which the writ is sought, namely, that the decision of the Circuit Court of Appeals in this case is in conflict with a decision of another Circuit Court of Appeals upon the same matter, movants submit the following additional argument:

Point I

A state law which recognizes an unconstitutional classification is just as repugnant to the Federal Constitution as a State law which creates such an unconstitutional classification.

That the state law sought to be declared unconstitutional in this case does recognize and protect the power of the State Democratic Executive Committee to deprive Negroes of their legal rights upon the ground of color alone is clear.

In the case of White v. Lubbock, —Tex.—, 30 S. W. (2nd) 722, it is held that the resolution involved in this case was a "valid exercise through its proper officers of such party's inherent power, (recognized, but not created by R. S. Article 3107) * * * *" In that case the Court of Civil Appeals was the court of last resort in Texas.

In the instant case, the Circuit Court of Appeals held "The act of 1927 was not needed to confer such power, it merely recognized a power that already existed."

As protection for themselves in the exercise of the power thus recognized, the State of Texas by statute clothed the defendants with, among others, the following sovereign powers of the state (See Articles 3002 and 3105 of the Revised Civil Statutes of Texas): To administer oaths; to act with the same power as a district judge to enforce order and keep the peace; to appoint special peace officers; to issue warrants of arrest for felony, misdemeanor

or breach of peace; to authorize confinement of persons arrested to jail; to compel observance of the law against loitering or electioneering within 100 feet of polling places; to arrest or cause to be arrested any one carrying voters to polls contrary to law.

No private individual or organization has any such powers as these.

As to the power of the State of Texas, thus to recognize and protect the State Democratic Executive Committee in depriving Negroes of their legal right to vote in the Texas statutory primary, the holding of Judge Groner in West v. Bliley, 33 Fed. (2nd) 177, 180, which was adopted by the Circuit Court of Appeals for the Fourth Circuit in Bliley v. West, 42 Fed. (2nd) 101, is pertinent:

> "That a law which recognizes or which authorizes a discrimatory test or standard does curtail and subvert them ("the provisions of the Constitution and the rights of voters") there can be no doubt, and such a law is therefore in conflict with the Fourteenth and Fifteenth Amendments to the Constitution of the United States."

With reference to the recognition and protection given by the State of Texas to this device to deprive Negroes of their legal right to vote in the Texas statutory primaries, it is a fact of the greatest significance that the appellate courts of Texas have uniformly held in every instance, except where Negroes were excluded, that the State Democratic Executive Committee, as well as other party committees, were without power to prescribe qualifications for participating in the Texas statutory primaries inconsistent with the qualifications fixed by the Constitution and statutes of the State.

The leading case is that by the Supreme Court of Texas in Love v. Wilcox —Texas—, 28 S. W. (2nd) 515, where it was held that the State Democratic Executive Committee was without power to prescribe qualifications that a person

seeking to participate in the statutory primary election must have supported the Democratic nominees and electors in 1928, and must also pledge himself without reservations to support the nominees of the Democratic Party.

To the same effect, among others, is the case of Clancy v. Clough, —Tex.—, 30 S. W. (2d) 569, which held that the committee was without power to place upon the statutory primary ballot "any pledge other than that prescribed by the statute, or one containing the additional word 'white' before the word 'Democrat' in the pledge prescribed by the statute." This case is cited with approval by the Supreme Court of Texas in Love v. Wilcox, supra.

The word "white" does not appear in the test pledge statute, Article 3110 of the Revised Civil Statutes of Texas, but the court authorized the Democratic Committee to insert the word "white" (forbidding of course any other addition or change) and this construction must be read into the statute, as if put there by the legislature. This is the effect of the holding in the case of Bailey v. Alabama, 219 U. S. 219, where Mr. Justice Hughes, now the Chief Justice, said:

> "There is also a rule of evidence enforced by the Courts of Alabama which must be regarded as having the same effect as if read into the statute itself * * * " etc.

It is also a fact that the case of Clancy v. Clough, supra, was decided by the Texas Court of Civil Appeals after Nixon v. Herndon, supra, was decided.

Conclusion

Believing that they have submitted sufficient reasons for this Honorable Court to exercise in their favor the Court's discretionary power in this case, movants pray the Court that they be granted leave to file this brief in support of the petition for writ of certiorari herein, and also to file a brief upon the merits and to argue the case in the

event said petition is granted; and, in the alternative, movants pray that, in the event for any reason, the motion of movants cannot be granted, the attorneys for movants be given leave to file said briefs and to make such argument as amici curiae.

Respectfully submitted,

J. ALSTON ATKINS
CARTER W. WESLEY
Attorneys for Movants,

J. M. NABRIT, Jr.
NABRIT, ATKINS AND WESLEY
Of Counsel

AMICUS CURIAE BRIEF

INDEX

	PAGE
MOTION FOR LEAVE TO FILE BRIEF	1
CERTIFICATE OF COUNSEL	3
BRIEF ON THE MERITS	4
Decisions Below	4
Jurisdiction	4
Statement of the Case	5
ARGUMENT:	
Summary	8
Detailed Argument	10
POINTS:	
1. The statute is unconstitutional because, on its face, it creates an arbitrary, unreasonable and unfair classification, which denies to plaintiff the equal protection of the laws	10
2. The statute is unconstitutional because, as interpreted by the state courts and the lower Federal Courts, it recognizes an unconstitutional discrimination against plaintiff and all other qualified Negroes	11
3. The purpose and intent of the Legislature in passing the statute was to accomplish by indirect action that which the Supreme Court of the United States had held in Nixon v. Herndon, 273 U. S. 536, it was without power to do by direct enactment	12
Judicial Knowledge	13
Intent Shown by Emergency Clause	14

PAGE

Intent Shown by Legislative Debate 15
Intent Shown by Historical Facts 17
History of Effort To Bar Negroes From Democratic Primaries 17

4. The statute is unconstitutional because in its operation, it is used as one of the instrumentalities by which, with the approval of the State of Texas, the plaintiff and all other qualified Negroes are deprived of their legal right to vote in the statutory primary election involved in this case 20

5. The resolution is no defense to this suit because plaintiff had a legal right to vote in said election and defendants' action in depriving him of that legal right was a legal wrong 21

6. The State of Texas could not by statute grant immunity to defendants from the consequences of that wrong (Nixon v. Herndon, supra), and, a fortiori, the State Democratic Executive Committee, whether it be a creature of the State or merely a body of private individuals, has no power to grant such immunity 21

7. The jurisdictional power of Federal Courts to grant relief in any case is not limited to the enforcement of Federal rights or to acts done either by State Officers or in the execution of state power 23

8. The disfranchisement of plaintiff and other qualified Negroes disclosed by the record violates the 15th Amendment, because citizens of one race

PAGE

were guaranteed by law the right to vote in the statutory election involved in this case, while plaintiff and other qualified Negroes were not 24

9. This Court should decide all of the questions involved in this case, especially those pertaining to the "inherent power" and "private individuals" arguments, in order to prevent a multiplicity of suits and to prevent undue hardship upon plaintiff and all other qualified Negroes in Texas 25

CONCLUSION 26

CASES CITED

Bailey v. Alabama, 219 U. S. 219 20

Blethen v. Bonner, 52 S. W. 571 14

Bliley v. West, 42 Fed (2nd) 101 ..... 4, 12

Chicago v. Kendall, 266 U. S. 94 4

Civil Rights Cases, 109 U. S. 3 22

Clancy v. Clough, —Tex—, 30 S. W. (2nd) 569 21

Columbus R. Co. v. Columbus, 249 U. S. 399 4

Connole v. Norfolk, etc., 216 Fed 823 13

Connolly v. Union Sewer Pipe Co., 184 U. S. 540 ..... 10, 11

Ex Parte Davidson, 57 Fed 883 14

Faris v. Hope, 298 Fed 727 13

Green v. Ry., 244 U. S. 499 4

Grigsby v. Harris, 27 Fed (2nd) 942 25

Kaye v. May, 296 Fed 450 13

Knower v. Haines, 31 Fed 513 13

L. and N. Ry. v. Garrett, 231 U. S. 298, ... 24

Lamar v. Micou, 114 U. S. 218 18

PAGE

Love v. The City Democratic Committee, No. 438 in Equity, U. S. Dist. Ct. at Houston 25

Love v. Wilcox et al, —Tex—, 28 S. W. (2nd) 515 .....10, 17, 21, 24

M. K. T. Ry. v. McIlhaney, 129 S. W. 153 14

Mills v. Green, 159 U. S. 651 13

Muller v. Oregon, 208 U. S. 412 14

Nixon v. Condon, et al, 49 Fed (2nd) 1012 ..... 4, 5, 8, 21, 22

Nixon v. Herndon, 273 U. S. 536 ..... 5, 9, 12, 13, 14 15, 19, 21, 22, 23, 24, 25, 26

Quinn v. United States, 238 U. S. 347 15

Quon Wing v. Kirkendall, 223 U. S. 59 13

Rose Mfg. Co. v. Western Union Tel. Co., 251 S. W. 337 14

Siles v. L. and N. Railway, 213 U. S. 175 24

Simpson v. United States, 252 U. S. 547 14

State v. Meharg, 287 S. W. 670 ..... 14, 26

Southern Ry. Co. v. Greene, 216 U. S. 400 11

Swafford v. Templeton, 185 U. S. 487 5

Truax v. Corrigan, 257 U. S. 312 11

United States v. Reese, 92 U. S. 214 ..... 5, 24

United States v. Sanders, 290 Fed 428 14

United States v. Wallace, 279 Fed. 401 14

Weaver v. Palmer Bros. Co., 270 U. S. 402 13

West v. Bliley, 33 Fed (2nd) 177 12

White v. Lubbock, et al., —Tex—, 30 S. W. (2nd) 722 ..... 10, 12, 21, 24, 25

Wiley v. Sinkler, 179 U. S. 58 5

PAGE

Wiley v. Webber, et al, No. 432 in Equity, U. S. Dist. Ct. at San Antonio 25
Williams v. Castleman, 247 S. W. 263 14
Yick Wo v. Hopkins, 118 U. S. 356 ..... 11, 21

REFERENCES TO CONSTITUTION

Constitution of the United States:
Fourteenth Amendment 8, 14, 15
Fifteenth Amendment 8, 9, 24

UNITED STATES STATUTORY REFERENCES

Judicial Code:
Section 24 (1) 4
Section 24 (11) 5
Section 24 (12) 5
Section 24 (14) 5
United States Code:
Title 8, Section 31 5
Title 8, Section 43 5

TEXAS STATUTORY REFERENCES

Revised Civil Statutes of 1925:
Article 2642 27
Article 3002 6
Articles 3100 to 3153 (inclusive) 5
Article 3104 6
Article 3105 6
Article 3107 ..... 6, 12, 13, 14, 15, 17, 19, 20
Title 49, Chapters 1 to 9 (inclusive) 26
Resolutions of Democratic State Executive Committee 7
Laws of 1927:
Chapter 67 6
House Journal:
First Called Session of the 40th Legislature 15, 16

Supreme Court of the United States

OCTOBER TERM, 1931

No. 265

L. A. NIXON,

Petitioner,

against

JAMES CONDON AND C. H. KOLLE,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF ON THE MERITS, AND BRIEF ATTACHED THERETO, IN SUPPORT OF THE PETITIONER, L. A. NIXON

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

C. N. Love, Julius White, The Houston Informer and Texas Freeman, and their attorneys herein, individually and on behalf of all other Negroes in the City of Houston, in Harris County, and the State of Texas, who are not otherwise represented, hereby respectfully move this Honorable Court for leave to file, as amici curiae, the brief hereto attached, as a brief upon the merits in the above styled and numbered cause, in support of the petitioner, L. A. Nixon.

In support of this motion movants respectfully show that there are in their opinion important arguments and matters, pertinent to the issues involved in this case, which have not heretofore or otherwise been called to the attention of this Court, but which movants feel that this Court should have before it in deciding this case upon the merits. As evidence thereof, without asking the Court to read the

entire brief for this purpose, movants call attention to Point No. 1 in said brief, which is hereby incorporated into this motion by reference.

WHEREFORE, premises considered, movants pray that this Honorable Court may grant them leave to file the brief attached hereto as a brief upon the merits, in support of the petitioner, L. A. Nixon.

Dated November 18, A. D., 1931.

C. N. LOVE
JULIUS WHITE
THE HOUSTON INFORMER AND TEXAS FREEMAN
By G. H. WEBSTER, President
J. ALSTON ATKINS
One of Attorneys for Movants
Office and Post Office Address
409 Smith Street, Houston, Texas.

THE STATE OF TEXAS
COUNTY OF HARRIS

Before me, the undersigned authority, on this day personally appeared C. N. Love, Julius White, G. H. Webster, and J. Alston Atkins, who, having been by me first duly sworn, on their oaths depose and say:

That they are the identical persons who executed the within and foregoing motion, and that the allegations therein set forth are true, according to their best knowledge and belief.

Subscribed and sworn to before me this the 18th day of November, A. D., 1931.

LELAND D. EWING
Notary Public in and for Harris County, Texas.

(SEAL)
My commission expires June 1, 1933.

CERTIFICATE OF COUNSEL

I hereby certify that in my opinion the foregoing motion for leave to file brief is well founded in law, and is filed in good faith and not for delay.

J. ALSTON ATKINS

One of Attorneys for Movants.

Supreme Court of the United States

OCTOBER TERM, 1931

No. 265

L. A. NIXON,

Petitioner,

against

JAMES CONDON AND C. H. KOLLE,

Respondents.

BRIEF ON THE MERITS IN SUPPORT OF THE PETITIONER, L. A. NIXON

DECISIONS BELOW

The decisions in the courts below, which are sought to be reversed here, are: Nixon v. Condon et al., 34 Fed. (2nd) 464, and Nixon v. Condon et al., 49 Fed (2nd) 1012.

JURISDICTION

There are at least three grounds upon which jurisdiction may be sustained in this case:

1. That the matter in controversy exceeds in value the sum of $3,000 and involves a substantial Federal question. Sec. 24 (1) of the Judicial Code; Chicago v. Kendall, 266 U. S. 94; Green v. Ry. 244 U. S. 499; Columbus R. Co. v. Columbus 249 U. S. 399.

That there is at least a substantial Federal question involved is indicated by the fact that the Circuit Court of Appeals for the Fourth Circuit has held to be unconstitutional a state statute similar to the one alleged in this case to be unconstitutional. Bliley v. West, 42 Fed (2nd) 101.

2. That the controversy involves rights created by the Constitution and laws of the United States, and is, therefore, in its "essence Federal," "however

> much wanting in merit may be the averments which it is claimed establish the violation of the Federal right." Swafford v. Templeton, 185 U. S. 487.

The right to vote for senator and representatives in Congress is created by the Constitution and laws of the United States. Wiley v. Sinkler, 179 U. S. 58; Swafford v. Templeton, supra.

The right to "exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude" is also created by such Constitution and laws. United States v. Reese, 92 U. S. 214.

These two Federal rights are the foundation of this controversy.

> 3. That this is a suit to recover damages for the deprivation of one of the civil rights, namely, the right to vote. Judicial Code. Sec. 24 (11) (12) (14); Secs. 31, 43, Title 8, United States Code; Nixon v. Herndon, 273 U. S. 536.

Even the Circuit Court of Appeals in the instant case concedes that plaintiff had a legal right to vote in the primary election involved in this case.

> "It is of course to be conceded, since the decision in Nixon v. Herndon, supra, that the right of a qualified citizen to vote extends to primary elections as well as to general elections." Nixon v. Condon et al., 49 Fed. (2nd) 1012, 1013.

STATEMENT OF THE CASE

By the Election Laws of Texas, Title 50, Chapter 13, Articles 3100 to 3153, Revised Civil Statutes, the State required that there be held on July 28, 1928, an election for the purpose of nominating candidates for representatives in the United States Congress, for United States senator, and for state, county, district, and precinct officers in the State of Texas. With great particularity, these statutes set

forth the time, place, and method of holding such election, and the requirements for participation therein.

The defendants were election judges of said election, their offices being created by said Election Laws (Article 3104); and as such judges, they were clothed by statute (Articles 3002 and 3105 of said Election Laws) with, among others, the following sovereign powers of the state of Texas: To administer oaths; to act with the same power as a district judge to enforce order and keep the peace; to appoint special peace officers; to issue warrants of arrest for felony, misdemeanor or breach of peace; to authorize confinement of persons arrested to jail; to compel observance of law against loitering or electioneering within 100 feet of polling places; to arrest or cause to be arrested anyone carrying voters to polls contrary to law.

No private individual or organization has any such powers as these.

The plaintiff was a member of the Democratic Party and a duly qualified elector and voter under the laws of the State of Texas, except that he was a Negro, and he attempted to vote in said election.

The defendants denied plaintiff the right to vote in said election, defending their action under the following statute and resolution:

Chapter 67 of the Laws of 1927, passed by 1st called session of 40th Legislature of Texas, which is now Article 3107 of the Revised Civil Statutes of Texas:

"AUTHORIZING POLITICAL PARTIES THROUGH STATE EXECUTIVE COMMITTEES TO PRESCRIBE QUALIFICATIONS OF THEIR MEMBERS

(H. B. No. 57)

Chapter 67

"An act to repeal Article 3107 of Chapter 13 of the Revised Civil Statutes of Texas, and substitut-

ing in its place a new article providing that every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party, and declaring an emergency.

"Be it enacted by the Legislature of the State of Texas:

"Section 1. That Article 3107 of Chapter 13 of the Revised Civil Statutes of Texas be and the same is hereby repealed and a new article is hereby enacted so as to hereafter read as follows:

'Article 3107. Every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party; provided that no person shall ever be denied the right to participate in a primary in this State because of former political views or affiliations or because of membership or non-membership in organizations other than the political party.'

"Sec. 2. The fact that the Supreme Court of the United States has recently held Article 3107 invalid, creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended and said rule is hereby suspended, and that this Act shall take effect and be in force from and after its passage, and it is so enacted.

"Aproved June 7, 1927

"Effective 90 days after adjournment."

Resolution passed by the State Democratic Executive Committee of Texas pursuant to the power either conferred or recognized by the above quoted statute:

"Resolved: That all white Democrats who are qualified under the Constitution and laws of Texas and who subscribe to the statutory pledge provided in Article 3110, Revised Civil Statutes of Texas, and none other, be allowed to participate in

> the primary elections to be held July 28, 1928, and August 25, 1928, and further, that the Chairman and Secretary of the State Democratic Executive Committee be directed to forward to each Democratic County Chairman in Texas a copy of this resolution for observance."

Thereupon, plaintiff brought this suit for damages in the sum of five thousand dollars ($5,000) for the legal wrong done to him by defendants in depriving him of his legal right to vote in said election; the plaintiff alleging that the above statute and resolution were no defense and that they violated his rights under the 14th and 15th Amendments to the Constitution of the United States.

The District Court sustained a motion to dismiss, 34 Fed (2nd) 464, and the Circuit Court of Appeals sustained the decision of the District Court, 49 Fed (2nd) 1012.

Questions:

1. Is the above statute constitutional?
2. Is the above resolution a valid defense to this action?
3. Does the disfranchisement of plaintiff and the other Negroes disclosed by the record violate the 15th Amendment?

ARGUMENT

SUMMARY:

1. The statute is unconstitutional because
   (a) On its face it creates an arbitrary, unreasonable, and unfair classification, which denies to plaintiff and all other qualified Negroes the equal protection of the laws.
   (b) As interpreted by the state courts and the lower Federal Courts in Texas, it recognizes and enforces an unconstitutional discrimination against plaintiff and all other qualifed Negroes.
   (c) The purpose and intent of the Legislature in passing

the statute was to accomplish by indirect action that which the Supreme Court of the United States had held in Nixon v. Herndon, 273 U. S. 536, it was without power to do by direct enactment.

(d) In operation the statute is used as one of the instrumentalities, with the approval of the State of Texas, by which the plaintiff and all other qualified Negroes are deprived of their legal right to vote in the statutory primary election involved in this case.

2. The resolution is no defense to this action.

(a) Plaintiff had a legal right to vote in said election, and defendants' action in depriving him of that right was a legal wrong.

(b) The State of Texas could not by statute grant immunity to defendants from the consequences of that wrong and, a fortiori, the State Democratic Executive Committee, whether it be a creature of the State, or merely a body of private individuals, could not grant such immunity.

(c) The jurisdictional power of Federal Courts to grant relief in any case is not limited to the enforcement of Federal rights or to acts done either by State officers, or in the execution of State power.

3. The disfranchisement of plaintiff and other qualified Negroes disclosed by the record, violates the 15th Amendment because citizens of one race were guaranteed by law the right to vote in the statutory election involved in this case, while plaintiff and other qualified Negroes were not.

4. This Court should decide all of the questions involved in this case, especially those pertaining to the "inherent power" and "private individuals" arguments, in order to prevent a multiplicity of suits and to prevent undue

hardship upon plaintiff and all other qualified Negroes in Texas.

DETAILED ARGUMENT:

POINT I

The statute is unconstitutional because, on its face, it creates an arbitrary, unreasonable, and unfair classification, which denies to plaintiff the equal protection of the laws.

It provides:

> "Every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party; provided that no person shall ever be denied the right to participate in a primary in this State because of former political views or affiliations or because of membership or non-membership in organizations other than the political party."

The excepting provision "that no person shall ever be denied the right to participate in a primary in this State because of former political views or affiliations or because of membership or non-membership in organizations other than the political party" has been sustained by the Supreme Court of Texas as forbidding the exclusion of a person who neither had supported the Democratic Candidates in toto in the past nor would promise absolutely to do so in the future. Love v. Wilcox et al., —Tex.—, 28 S. W. (2nd) 515.

Likewise the power to exclude Negroes under the general power either conferred or recognized by the statute has been sustained by the Court of Civil Appeals of Texas, at Galveston, in a case in which it was the court of last resort.

White v. Lubbock et al.
—Tex—, 30 S. W. (2nd) 722

In Connolly v. Union Sewer Pipe Co., 184 U. S. 540, an anti-trust statute was held invalid under the equal

protection clause because it contained the excepting provision that it should "not apply to agricultural products or live stock while in the hands of the producer or raiser."

In the Connolly Case this court said at page 558:

> "But upon this general question we have said that that the guarantee of the equal protection of the laws means 'that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and in like circumstances.' Missouri v. Lewis, 101 U. S. 22, 31."

The denial of equal protection is clear.

> "Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against a larger class." Truax v. Corrigan, 257 U. S. 312, 333.
>
> "The equal protection of the laws is a pledge of the protection of equal laws." Yick Wo v. Hopkins, 118 U. S. 356, 369.
>
> "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis."
>
> Southern Ry. Co. v. Greene
> 216 U. S. 400, 417.

What could be more unfair, arbitrary, unreasonable, and unjust than the exemption in this case which forbids the exclusion of disloyal white Democrats, while permitting the exclusion of Negro Democrats on the ground of race and color alone?

POINT II

The statute is unconstitutional because, as interpreted

by the state courts and the lower Federal courts, it recognizes an unconstitutional discrimination against plaintiff and all other qualified Negroes.

That the state law sought to be declared unconstitutional in this case does recognize and protect the power of the State Democratic Executive Committee to deprive Negroes of their legal rights upon the ground of color alone is clear. In the case of White v. Lubbock, —Tex.—, 30 S. W. (2nd) 722, it is held that the resolution involved in this case was a "valid exercise through its proper officers of such party's inherent power, (recognized, but not created by R. S. Article 3107) * * * " In that case the Court of Civil Appeals was the court of last resort in Texas.

In the instant case, the Circuit Court of Appeals held "The act of 1927 was not needed to confer such power, it merely recognized a power that already existed."

As to the power of the State of Texas, thus to recognize and protect the State Democratic Executive Committee in depriving Negroes of their legal right to vote in the Texas statutory primary the holding of Judge Groner in West v. Bliley, 33 Fed (2nd) 177, 180, which was adopted by the Circuit Court of Appeals for the Fourth Circuit in Bliley v. West, 42 Fed (2nd) 101, is pertinent:

> "That a law which recognizes or which authorizes a discrimatory test or standard does curtail and subvert them ("the provisions of the Constitution and the rights of voters") there can be no doubt, and such a law is therefore in conflict with the Fourteenth and Fifteenth Amendments to the Constitution of the United States."

POINT III

The purpose and intent of the Legislature in passing the statute was to accomplish by indirect action that which the Supreme Court of the United States had held in Nixon v.

Herndon, 273 U. S. 536, it was without power to do by direct enactment.

The statute was passed as an emergency measure, and the reason therefor is stated in Section 2 of the Act as follows:

> "The fact that the Supreme Court of the United States has recently held Article 3107 invalid, creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended and said rule is hereby suspended, and that this Act shall take effect and be in force from and after its passage, and it is so enacted."

Judicial Knowledge

In the first place we mention the fact that the Supreme Court of the United States has held that a statute's or law's "invalidity may be shown by things which will be judicially noticed." Weaver v. Palmer Bros. Co., 270 U. S. 402, 410, but it has also been held that, unless these matters and things to be judicially noticed are called by counsel to the attention of the court, it will not notice them. "There are many things that courts would notice if brought before them that beforehand they do not know." Mr. Justice Holmes in Quong Wing v. Kirkendall, 223 U. S. 59, 64.

The Federal Courts will take judicial notice of the laws of every state. Mills v. Green, 159 U. S. 651; Lamar v. Micou, 114 U. S. 218.

The Federal Courts take judicial notice of those laws created by statute or judicial decisions. Faris v. Hope, 298 Fed 727; Kaye v. May, 296 Fed 450; Knower v. Haines, 31 Fed 513.

Federal Courts will take judicial notice of legislative journals. Connole v. Norfolk, etc., 216 Fed 823.

Federal Courts take judicial notice of historical facts.

Simpson v. United States, 252 U. S. 547; United States v. Wallace, 279 Fed 401; Ex Parte Davidson, 57 Fed 883. Texas cases to the same effect are: Blethen v. Bonner, 52 S. W. 571; Williams v. Castelman, 247 S. W. 263.

Federal Courts take judicial notice of matters of common knowledge. Muller v. Oregon, 208 U. S. 412; United States v. Sanders, 290 Fed 428. Texas cases to same effect are: State v. Meharg, 287 S. W. 670; M. K. T. Ry. v. McIlhaney, 129 S. W. 153; Rose Mfg. Co. v. Western Union Tel. Co., 251 S. W. 337.

Intent Shown By Emergency Clause

Prior to the decision in Nixon v. Herndon, supra, old Article 3107 of the Revised Civil Statutes of Texas read as follows, and contained no other provision:

"In no event shall a Negro be eligible to participate in a Democratic party primary election held in the State of Texas, and should a Negro vote in a Democratic primary election, such ballot shall be void and election officials shall not count the same."

This old Article 3107 dealt with only one subject, namely, the exclusion of Negroes from voting in the Texas Democratic primaries.

The said case of Nixon v. Herndon dealt with only one subject, namely, the legal right of Negroes to vote in the Texas Democratic primaries and the validity under the 14th Amendment to the Constitution of the United States of said old Article 3107, which sought to deprive Negroes of that right.

Upon the decision by the Supreme Court in said case of Nixon v. Herndon that Negroes had a legal right to vote in the Texas Democratic primaries and that old Article 3107, which sought to deprive them of that right, was a violation

of the equal protection clause of the 14th Amendment to the Constitution of the United States, the 1st Called Session of the 40th Legislature of Texas passed new Article 3107, which is in controversy in this suit, stating in the face of the new Artcle 3107 that the reason for its prompt passage was that the Supreme Court of the United States had created, by the said case of Nixon v. Herndon, "an emergency and an imperative public necessity"; which, we believe, shows on its face that the intent of the Legislature was nothing more than to circumvent, if possible, the decision of the Supreme Court of the United States in the said case of Nixon v. Herndon, and, if our belief is well founded, said new Article 3107, under Quinn v. United States, 238 U. S. 347, is just as unconstitutional as if the intent to exclude Negroes had been in words stated on the face of the Article itself.

Intent Shown By Legislative Debate

The debate in the Texas House of Representatives upon the passage of said new Article 3107, which was House Bill No. 57, we believe, shows that the purpose of passing said Article was to circumvent, if possible, the decision of the Supreme Court of the United States in said case of Nixon v. Herndon.

The House Journal of the 1st called Session of the 40th Legislature of Texas shows the following:

At page 302, Representative Faulk said: "I voted against House Bill No. 57 because it confers too much authority on thirty-one members. I sought to amend the bill by providing that these thirty-one men shall never prescribe property holding as a qualification of voting. As passed, the act empowers the State Executive Committee to prescribe without limit the qualifications of a voter, and they have ample power under the act to say that a man must be a Methodist,

a Mason, and a millionaire. This savors of autocracy and I will not sanction it by my vote. I will support any reasonable bill to curb the negro vote."

On the same page, Representative Stout said: "I voted 'nay' on House Bill No. 57 for the following reasons:

"In the first place, it is doubtful if the bill will accomplish its purpose, in view of the recent holding of the Supreme Court of the Unted States.

"On the other hand, admitting for the sake of argument that it would do so, then I am not willing to turn my government over to a small number of men who compose the State Executive Committee.

"The South has always handled the 'nigger' in a satisfactory manner, and I believe that it will continue to do so.

"In my humble judgment, it is far more dangerous to entrust our whole political destiny to a few men than the scare of the negro question would ever be. It is a matter of common knowledge that we, the people of Texas, have always voted our prejudices too often in the past. I fear that the pendulum might swing too far one way or the other, and that the day might come back when a few clicks and klans might run out the unterrified Democrats, or that the unterrified Democrats might get in the saddle and oust the kluckers, as they came close to doing in the past.

"I believe the whole affair makes a mountain out of nothingness, and that it is un-American and un-Democratic. I had rather take my chances on handling the 'nigger' than I would on thirty-one men who would have final authority to determine who should vote and who should not vote, and who should be a Democrat or not be a Democrat.

"The Constitution of Texas prescribes the qualifications of a voter—about that there can be no doubt. The Supreme Court has held a 'nigger' can vote under the present primary law. About that there can be no doubt. If the

primary election is an 'election' in the proper and legal sense, then a 'nigger' can vote, and no law can stop him.

"If a primary is not an election, as our Texas courts have said in the past, the State Executive Committee would have the same blanket authority to judge the qualifications of its own members, as does the Baptist Church. It could ostracise a man at will and set up a standard to suit itself. In that respect and to that extent we would be going back to the days of crowns and jeweled baubles of Bolsheviki Russia.

"It was Abraham Lincoln who said, 'The heart of the American people has never failed in a great crisis, and it never will.' To that philosophy I conform, when the whole people have a chance to record their sentiments. But I am not willing to trust my government and politics to what could very easily become an oligarchy."

Intent Shown By Historical Facts

Senator Thomas B. Love, who was a member of the Texas Senate when said Article 3107 was passed, filed a brief, signed by himself, in the Supreme Court of Texas, in the case of Love v. Wilcox, 28 S. W. (2nd) 515, upon which the Supreme Court granted him relief in that case, in which he set out, in the following historical statement, the fact, that said new Article 3107 had "no other purpose whatsoever" than "to provide, if possible, other means by which negroes could be barred from participation, both as candidates and as voters, in the primary elections of the Democratic party, which would stand the test of the courts":

"HISTORY OF EFFORT TO BAR NEGROES FROM DEMOCRATIC PRIMARIES"

"Prior to 1903, there was no law in Texas regulating primary elections or party nominations, and such elections and nominations, and the control and regulations of all af-

fairs of political parties was vested entirely in party conventions and executive committees. In that year, 1903, the Texas Legislature, for the first time, provided for regulating party primary elections and conventions, and party affairs, by law, through the passage of the first Terrell Election Law, which completely divested party conventions and committees of the control theretofore exercised by them.

"From the beginning of election legislation, the questions of barring or admitting negroes in Democratic primary elections was an important one, some counties, through their representatives, desiring that negroes be allowed to vote in Democratic primaries, while others strenuously insisted that they should be barred by statewide law. The first Terrell election law relegated this subject to the party executive committees of the various counties by the following provision:

> 'The County Executive Committee of the party holding any primary election may prescribe additional qualifications necessary to participate therein;' (see Section 94, p. 150, Acts of the First Called Session, 28th Legislature, 1903.)

"When the Terrell Election Law was generally revised by the Twenty-ninth Legislature in 1905, this same provision was re-enacted in the following language:

> 'The Executive Committee of any party for any county may prescribe additional qualifications for voters in such primary not inconsistent with this Act.'

"This same provision, in the same words, was re-enacted in the codification of the Revised Statutes of 1911, (see Art. 3093, R. C. S. 1911) and remained in force until 1923.

"Thus, from 1903 until 1923, just twenty years, the election laws of Texas provided that all qualified voters should be qualified to vote in any party primary, upon taking the prescribed party test, and provided no other statewide quali-

fications whatever for primary election voters, but, in effect, enabled a political party in any county to bar negroes if it saw fit to do so by prescribing 'additional qualfications.'

"Original Enactment of Article 3107"

"The Second Called Session of the Texas Legislature, in 1923, enacted a Statute amending Art. 3093, R. C. S. 1911, designed specifically to bar Negroes from participating in primary elections of the Democratic party in every county in Texas, which afterward was codified as Art. 3107, R. C. S. of 1925, and which read as follows:

> "'Art. 3107: In no event shall a negro be eligible to participate in a Democratic primary election held in the State of Texas, and should a negro vote in a Democratic primary election, such ballot shall be void and election officers shall not count the same.'

"Article 3107 Held Unconstitutional"

"It was the obvious purpose of this enactment to bar negroes not only from voting, but from participating in any way, either as voters or as candidates, in Democratic primaries.

"This Statute passed in 1923 was declared to be unconstitutional and void by the Supreme Court of the United States, in 1927, in the case of Nixon v. Herndon, et al, Volume 47, Supreme Court Reporter, page 446.

"Article 3107 Amended in 1927 so as to Give the State Executive Committee Whatever Power It Now Possesses"

"The Fortieth Legislature in its First Called Session held in 1927, having in mind that, this Statute of 1923 had been invalidated by the Courts, and desiring to provide, if possible, other means by which negroes could be barred from participation, both as candidates and as voters, in the primary elections of the Democratic party, which would stand

the test of the Courts, and having no other purpose whatsoever, passed a statute amending said Article 3107 so as to read as follows:

> 'Art. 3107: Every political party in this State, through its State Executive Committee shall have the power to prescribe the qualifications of its own members, and shall in its own way, determine who shall be qualified to vote or otherwise participate in such political party; provided, that no person shall ever be denied the right to participate in a primary in this State because of former political views or affiliations, or because of membership or non-membership in organizations other than the political party'."

We close this point with the following quotation from a decision by this Court:

> "What the State may not do directly, it may not do indirectly." Bailey v. Alabama 219 U. S. 219.

POINT IV

The statute is unconstitutional because in its operation, it is used as one of the instrumentalities by which, with the approval of the State of Texas, the plaintiff and all other qualified Negroes are deprived of their legal right to vote in the statutory primary election involved in this case.

> "Without imputing any actual motive to oppress, we must consider the natural operation of the statute here in question (Henderson v. Mayor, 92 U. S. 268), and it is apparent that it furnishes a convenient instrument for the coercion which the Constitution and the act of Congress forbid." Bailey v. Alabama, supra.

It is a matter of common and historical knowledge in Texas that, under this statute and its predecessors, nobody has been excluded from participation in the statutory primary elections except Negroes.

It is also a fact that this practice has been sustained by the Appellate Courts of Texas.

Love v. Wilcox et al, supra
White v. Lubbock et al, supra

In Clancy v. Clough, —Tex.— 30 S. W. (2nd) 569, the Court of Civil Appeals at Galveston held that the party committee was without power to place upon the statutory primary ballot "any pledge other than that prescribed by the statute or one containing the additional word 'white' before the word 'Democrat' in the pledge prescribed by the statute."

This Court has held that:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." Yick Wo v. Hopkins, 118 U. S. 356.

POINT V

The resolution is no defense to this suit because plaintiff had a legal right to vote in said election, and defendants' action in depriving him of that legal right was a legal wrong.

This was determined by this Court in Nixon v. Herndon, 273 U. S. 536, and is conceded by the Circuit Court of Appeals in the instant case. On this point, the Court said:

> "It is of course to be conceded, since the decision in Nixon v. Herndon, supra, that the right of a qualified citizen to vote extends to primary elections as well as to general elections." Nixon v. Condon, et al. 49 Fed (2nd) 1012, 1013.

POINT VI

The State of Texas could not by statute grant immunity to defendants from the consequences of that wrong (Nixon v. Herndon, supra), and, a fortiori, the State Democratic

Executive Committee, whether it be a creature of the State or merely a body of private individuals, has no power to grant such immunity.

If a creature of the State, Nixon v. Herndon, supra, definitely denies power to grant such immunity.

The Circuit Court of Appeals in this case based its decision upon these grounds:

> "The distinction between appellants' cases, the one under the 1923 statute and the other under the 1927 statute, is that he was denied the permission to vote in the former by state statute, and in the latter by resolution of the State Democratic Executive Committee."
>
> "A political party is a voluntary association, and as such has the inherent power to prescribe the qualifications of its members. The act of 1927 was not needed to confer such power; it merely recognized a power that already existed."

(a) The "private individuals" argument.

The following quotation from the opinion of this court in the Civil Rights Cases, 109 U. S. 3, is a conclusive answer to this argument:

> "In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindi-

cated by resort to the laws of the State for redress. An individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the Courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls or slander the good name of a fellow citizen; but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefor to the laws of the State where the wrongful acts are committed."

(b) The "inherent power" argument.

An analysis of Nixon v. Herndon, supra, is a complete answer to this argument.

After this court had stricken down the state statute held unconstitutional in Nixon v. Herndon, supra, the defendants were left with the same power that they have in this case. The statute disposed of, if the defendants had "inherent power" beyond statutory control to exclude plaintiff, this Court would not have granted relief. The fact that this Court did not recognize any such power shows that none existed. Defendants in this case being identical in capacity with defendants in Nixon v. Herndon, they have no greater powers than were there recognized.

POINT VII

The jurisdictional power of Federal Courts to grant relief in any case is not limited to the enforcement of Federal rights or to acts done either by State officers or in the execution of state power.

This proposition has become almost axiomatic; and it is

settled that, once the jurisdiction of the Federal Court attaches, it has jurisdictional power to grant whatever relief, whether State or Federal, may be disclosed by the record.

Siles v. L. and N. Railway
213 U. S. 175, 191
L. and N. Ry. v. Garrett
231 U. S. 298, 304

The assumption by the lower courts in this case that they could not grant relief against the deprivation of the right, which the Circuit Court of Appeals said existed, simply because the deprivation was not by the State, is, therefore, clearly unfounded. Indeed, inquiry into the capacity of the defendants is immaterial, there being other grounds of jurisdiction than that they are state officers. That the defendants in this case are also identical in capacity with the defendants in Nixon v. Herndon, supra, would also seem to settle this matter.

POINT VIII

The disfranchisement of plaintiff and other qualified Negroes disclosed by the record violates the 15th Amendment, because citizens of one race were guaranteed by law the right to vote in the statutory election involved in this case, while plaintiff and other qualified Negroes were not.

That these are the facts is clear from the decisions of the Texas appellate courts in Love v. Wilcox and White v. Lubbock, supra, and from the facts within the judicial knowledge of this Court.

Construing the 15th Amendment, this Court has held:

> "If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be."

United States v. Reese
92 U. S. 214

POINT IX

This Court should decide all of the questions involved in this case, especially those pertaining to the "inherent power" and "private individuals" arguments, in order to prevent a multiplicity of suits and to prevent undue hardship upon plaintiff and all other qualified Negroes in Texas.

It took plaintiff about three years to get a decision from this Court in Nixon v. Herndon, supra, and it has taken him about an equal period to get this case before this court. The expense involved in getting cases before this Court is no easy thing for Negroes to raise, who, as a matter of common knowledge, are generally poor. The delay causes irreparable damage, in that more than one election goes by before a decision can be had.

The reluctance of the Texas State Courts and of the lower Federal Courts to go beyond the compelling literal language of this court in granting relief to Negroes from the deprivation of their franchise rights seems clear from a careful study of the cases deciding the question, all of which have uniformly denied relief. In addition to the cases already referred to, the following may be cited:

Grigsby v. Harris
27 Fed (2nd) 942
Wiley v. Weber, et al
No. 432 in Equity, U. S. Dist. Ct. at San Antonio.
Love v. The City Democratic Committee
No. 438 in Equity, U. S. Dist.
Ct. at Houston.

"I am not disturbed as to what the Supreme Court of the United States in the omnipotence of its judicial power may hold on the question in some future opinion, but I am not disposed to lead the way to a change in its present views upon this question by anticipating that they will be changed or modified in some future opinion."

Chief Justice Pleasants, Concurring in
White v. Lubbock, supra

It is clear, we submit, that, if this court merely strikes down the statute in this case, as it did in Nixon v. Herndon, supra, and does not say in specific words that relief is granted because neither defendants nor the State Democratic Executive Committee, whether viewed as state officers or private individuals, have "inherent power" to destroy the legal rights of plaintiff to vote in the statutory election here involved, then plaintiff and all other qualified Negro voters will be faced with these "private individuals" and "inherent power" arguments anew, and will be forced at great expense and delay, and with a multiplicity of suits, to try these questions out all over again.

We trust that this Court may see fit to so decide these questions as to prevent this undue hardship.

Conclusion

In State v. Meharg, 287 S. W. 670, a Texas Court of Civil Appeals said:

> "Indeed, it is a matter of common knowledge in this State that a Democratic primary election held in accordance with our statutes is virtually decisive of the question as to who shall be elected at the general election. In other words, barring certain exceptions, a primary election is equivalent to a general election."

Those to whom are entrusted legislative powers in the State of Texas, therefore, feel that they owe no allegiance or duty to the Negroes of the State, in that they have been effectively excluded from participation in the primary elections "held in accordance wth our statutes."

As typical of what the fruits are, we mention what attitude these legislators have taken toward providing educational opportunities for the Negro citizens of Texas. See Title 49, Chapters 1 to 9, inclusive, of the Texas Revised Civil Statutes.

Exclusively for the white youths of the State, the following educational institutions are provided:

1. A State University, which must and does have "the departments of a first-class university."
2. An Agricultural and Mechanical College "for instruction in agriculture, the mechanical arts, and the natural sciences connected therewith."
3. John Tarleton Agricultural College, which "shall rank as a Junior Agricultural College."
4. North Texas Junior Agricultural College.
5. College of Industrial Arts.
6. Texas Technological College.
7. School of Mines and Metallurgy.
8. Sam Houston State Teachers' College.
9. North Texas State Teachers' College.
10. Southwest Texas State Teachers' College.
11. Texas College of Arts and Industries.

For Negro youth, there is provided the Prairie View State Normal and Industrial College, and nothing more. In the words of the statute (Art. 2642), it is limited to a "four-year college course of classical and scientific studies." This is the typical attitude of legislators whose election may not be affected by the votes of the Negroes of the State, who constitute about one-sixth of the total population.

WHEREFORE, premises considered, we pray that this Honorable Court may here reverse the decisions of the Circuit Court of Appeals and the District Court.

Respectfully submitted,

J. ALSTON ATKINS
CARTER W. WESLEY
Attorneys for Movants.

J. M. NABRIT, Jr.
NABRIT, ATKINS AND WESLEY
Of Counsel

Supreme Court of the United States

OCTOBER TERM, 1931

No. 265

L. A. NIXON,

Petitioner,

against

JAMES CONDON and C. H. KOLLE

Respondents.

MOTION FOR LEAVE TO PARTICIPATE IN THE REARGUMENT

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

C. N. Love, Julius White, The Houston Informer and Texas Freeman, and their attorneys herein, individually and on behalf of all other Negroes in the City of Houston, Harris County, and State of Texas, who are not otherwise represented, hereby respectfully move this Honorable Court for leave to participate, as amici curiae or otherwise as the Court may direct, in the reargument of the above styled and numbered cause, which reargument was by this Court, on Monday, January 18, 1932, ordered.

In support of this motion, movants respectfully show to the Court as follows:

1. That, on October 5, 1931, this Court granted the movants leave to file a brief in support of the petition for writ of certiorari, and that said brief, in the opinion of movants, submits a different point of view, a different analysis of the issues involved, and important arguments which are

different from those submitted in the brief of petitioner in support of his application for the writ.

2. That, on December 8, 1931, the writ of certiorari having been theretofore granted, this Court granted to movants leave to file a brief upon the merits, and that said brief, in the opinion of movants, submits a different point of view, a different analysis of the issues involved, and important arguments which are different from those submitted in the brief of petitioner upon the merits.

3. That, on January 7, 1932, the case was submitted upon oral argument by counsel for petitioner. These movants are advised and believe that the case was argued upon the theory of counsel for petitioner that there was properly involved in the case a question of party membership, and that the universal rule that in party matters the party is supreme was inapplicable in this case because the State of Texas had so far acted in the matter as to deprive the party of the power, which it otherwise possesses. As evidence the following quotations are cited:

> "The only issue in this case is, then, the question of whether the acts of the respondents was state action." Page 12 of Petitioner's Brief on the Merits.
>
> "The State being the supreme sovereignty, it must be deemed to have superseded whatever sovereign powers political parties may previously have had with respect to the control of primaries and party membership." Page 21 of Petitioner's Brief on the Merits.

4. That, under the point of view of movants and their analysis of the issues involved, there is properly no question

of party membership involved in the case; the fundamental issue, movants think, being the power of any State, whether Michigan or Texas, to provide for a statutory election in which the State guarantees to certain of its citizens the right to participate, while declining to guarantee such right to others of its citizens, when they are sought to be deprived of that right on the ground of race and color alone.

Under this point of view and analysis, movants believe that, in view of the following language of the Circuit Court of Appeals in this case, to wit:

> "It is of course to be conceded, since the decision in Nixon v. Herndon, supra, that the right of a qualified citizen to vote extends to primary elections as well as to general elections." Nixon v. Condon, et al. 49 Fed. (2nd) 1012, 1013,

and, in view of the fact that this Court has jurisdiction by reason of the substantial contentions that the Texas statute involved is unconstitutional, it is wholly immaterial whether the defendants' action is state action or not, this court's jurisdictional power extending to the relief against any legal wrong disclosed by the record.

5. That, should this Court decide the questions involved in this case adversely to the petitioner, not only he, but the 854,964 Negroes in Texas (according to the 1930 census), as well as millions of other Negroes all over the South, where, as a matter of common knowledge, the same system of disfranchising Negroes is in operation, will be perpetually denied the right to vote; which, as a matter of common

knowledge in Texas, means a denial of good streets, drainage, lights, and adequate police and fire protection in Negro neighborhoods; a denial of a fair proportion of parks and playgrounds; a denial of adequate library facilities; a denial of adequate educational opportunities; a denial of adequate hospitals and other health rehabilitating institutions; denial of adequate care to Negro delinquents and unfortunates; and a denial of anything like a semblance of justice in the distribution of all of the other civic benefits which flow from the State to its citizens, the burdens of citizenship in Texas being distributed, as a matter of common knowledge, without regard to race or color. Movants respectfully ask the court to judicially notice these matters of common knowledge.

6. That, under the circumstances set out in this motion, movants believe that the matters involved are so grave, and the millions of lives to be affected so numerous, that the point of view and analysis contained in the briefs which this Court has permitted movants to file in this case, should have opportunity to be submitted to this Honorable Court upon oral argument before this case is decided upon its merits.

Movants and their attorneys feel it not improper also to suggest to this Court, that because they have to live in Texas under the system being considered in this case, they are justified in urging the peculiar pertinence here of the following words of Mr. Justice Holmes in the case of Diaz v.

Gonzalez y Lugo, 67 L. ed. 550, 552:

> "When we contemplate such a system from the outside it seems like a wall of stone, every part even with all the others, except so far as our own local education may lead us to see subordinations to which we are accustomed. But to one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have got from the books."

WHEREFORE, premises considered, movants and their attorneys pray that this Honorable Court may grant them leave to participate in the reargument of this case.

Dated February 3, 1932.

C. N. LOVE
JULIUS WHITE
THE HOUSTON INFORMER AND TEXAS FREEMAN
By G. H. WEBSTER, President
J. ALSTON ATKINS,
One of Attorneys for Movants
Office and Post Office Address
409 Smith Street, Houston, Texas.

THE STATE OF TEXAS
COUNTY OF HARRIS

Before me, the undersigned authority, on this day personally appeared C. N. Love, Julius White, G. H. Webster, and J. Alston Atkins, who, having been by me first duly sworn, on their oaths depose and say:

That they are the identical parties who executed the

within and foregoing motion, and that the allegations set forth therein are true, according to their best knowledge and belief.

Subscribed and sworn to before me this 3rd day of February, A. D. 1932.

LELAND D. EWING
Notary Public in and for Harris County, Texas.

My commission expires June 1, 1933.
(SEAL)

Certificate of Counsel

I hereby certify that in my opinion the foregoing Motion for Leave to Participate in the Reargument is well founded in law and is filed in good faith and not for delay.

J. ALSTON ATKINS,
One of Attorneys for Movants.

SUPREME COURT OF THE UNITED STATES.

No. 265.—October Term, 1931.

L. A. Nixon, Petitioner, *vs.* James Condon and C. H. Kolle, Respondents. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[May 2, 1932.]

Mr. Justice Cardozo delivered the opinion of the Court.

The petitioner, a Negro, has brought this action against judges of election in Texas to recover damages for their refusal by reason of his race or color to permit him to cast his vote at a primary election.

This is not the first time that he has found it necessary to invoke the jurisdiction of the federal courts in vindication of privileges secured to him by the federal Constitution.

In *Nixon* v. *Herndon*, 273 U. S. 536, decided at the October Term, 1926, this court had before it a statute of the State of Texas (Article 3093a, Revised Civil Statutes, afterwards numbered 3107) whereby the legislature had said that "in no event shall a negro be eligible to participate in a democratic party primary election [held in that State]", and that "should a negro vote in a democratic primary election, the ballot shall be void", and election officials were directed to throw it out. While that mandate was in force, the Negro was shut out from a share in primary elections, not in obedience to the will of the party speaking through the party organs, but by the command of the State itself, speaking by the voice of its chosen representatives. At the suit of this petitioner, the statute was adjudged void as an infringement of his rights and liberties under the Constitution of the United States.

Promptly after the announcement of that decision, the legislature of Texas enacted a new statute (1. 1927, c. 67) repealing the article condemned by this court; declaring that the effect of the decision was to create an emergency with a need for immediate action; and substituting for the article so repealed another bear-

ing the same number. By the article thus substituted, "every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party; provided that no person shall ever be denied the right to participate in a primary in this State because of former political views or affiliations or because of membership or non-membership in organizations other than the political party."

Acting under the new statute, the State Executive Committee of the Democratic party adopted a resolution "that all white democrats who are qualified under the constitution and laws of Texas and who subscribe to the statutory pledge provided in Article 3110, Revised Civil Statutes of Texas, and none other, be allowed to participate in the primary elections to be held July 28, 1928, and August 25, 1928", and the chairman and secretary were directed to forward copies of the resolution to the committees in the several counties.

On July 28, 1928, the petitioner, a citizen of the United States, and qualified to vote unless disqualified by the foregoing resolution, presented himself at the polls and requested that he be furnished with a ballot. The respondents, the judges of election, declined to furnish the ballot or to permit the vote on the ground that the petitioner was a Negro and that by force of the resolution of the Executive Committee only white Democrats were allowed to be voters at the Democratic primary. The refusal was followed by this action for damages. In the District Court there was a judgment of dismissal (34 F. (2d) 464), which was affirmed by the Circuit Court of Appeals for the Fifth Circuit, 49 F. (2d) 1012. A writ of certiorari brings the cause here.

Barred from voting at a primary the petitioner has been, and this for the sole reason that his color is not white. The result for him is no different from what it was when his cause was here before. The argument for the respondents is, however, that identity of result has been attained through essential diversity of method. We are reminded that the Fourteenth Amendment is a restraint upon the States and not upon private persons unconnected with a State. *United States* v. *Cruikshank*, 92 U. S. 542; *Strauder* v. *West Virginia*, 100 U. S. 303; *Ex parte Virginia*,

100 U. S. 339, 346; *James* v. *Bowman*, 190 U. S. 127, 136. This line of demarcation drawn, we are told that a political party is merely a voluntary association; that it has inherent power like voluntary associations generally to determine its own membership; that the new article of the statute, adopted in place of the mandatory article of exclusion condemned by this court, has no other effect than to restore to the members of the party the power that would have been theirs if the lawmakers had been silent; and that qualifications thus established are as far aloof from the impact of constitutional restraint as those for membership in a golf club or for admission to a Masonic lodge.

Whether a political party in Texas has inherent power today without restraint by any law to determine its own membership, we are not required at this time either to affirm or to deny. The argument for the petitioner is that quite apart from the article in controversy, there are other provisions of the Election Law whereby the privilege of unfettered choice has been withdrawn or abridged (citing, *e. g.*, Articles 2955, 2975, 3100, 3104, 3105, 3110, 3121, Revised Civil Laws); that nomination at a primary is in many circumstances required by the statute if nomination is to be made at all (Article 3101); that parties and their representatives have become the custodians of official power (Article 3105); and that if heed is to be given to the realities of political life, they are now agencies of the State, the instruments by which government becomes a living thing. In that view, so runs the argument, a party is still free to define for itself the political tenets of its members, but to those who profess its tenets there may be no denial of its privileges.

A narrower base will serve for our judgment in the cause at hand. Whether the effect of Texas legislation has been to work so complete a transformation of the concept of a political party as a voluntary association, we do not now decide. Nothing in this opinion is to be taken as carrying with it an intimation that the court is ready or unready to follow the petitioner so far. As to that, decision must be postponed until decision becomes necessary. Whatever our conclusion might be if the statute had remitted to the party the untrammeled power to prescribe the qualifications of its members, nothing of the kind was done. Instead, the statute lodged the power in a committee, which excluded the petitioner

and others of his race, not by virtue of any authority delegated by the party, but by virtue of an authority originating or supposed to originate in the mandate of the law.

We recall at this point the wording of the statute invoked by the respondents. "Every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party." Whatever inherent power a State political party has to determine the content of its membership resides in the State convention. *Bryce, Modern Democracies,* Vol. 2, p. 40. There platforms of principles are announced and the tests of party allegiance made known to the world. What is true in that regard of parties generally, is true more particularly in Texas, where the statute is explicit in committing to the State convention the formulation of the party faith (Article 3139). The State Executive Committee, if it is the sovereign organ of the party, is not such by virtue of any powers inherent in its being. It is, as its name imports, a committee and nothing more, a committee to be chosen by the convention and to consist of a chairman and thirty-one members, one from each senatorial district of the State (Article 3139). To this committee the statute here in controversy has attempted to confide authority to determine of its own motion the requisites of party membership and in so doing to speak for the party as a whole. Never has the State convention made declaration of a will to bar Negroes of the State from admission to the party ranks. Counsel for the respondents so conceded upon the hearing in this court. Whatever power of exclusion has been exercised by the members of the committee has come to them, therefore, not as the delegates of the party, but as the delegates of the State. Indeed, adherence to the statute leads to the conclusion that a resolution once adopted by the committee must continue to be binding upon the judges of election though the party in convention may have sought to override it, unless the committee, yielding to the moral force of numbers, shall revoke its earlier action and obey the party will. Power so intrenched is statutory, not inherent. If the State had not conferred it, there would be hardly color of right to give a basis for its exercise.

Our conclusion in that regard is not affected by what was ruled by the Supreme Court of Texas in *Love* v. *Wilcox,* 28 S. W. (2d)

515, or by the Court of Civil Appeals in *White* v. *Lubbock*, 30 S. W. (2d) 722. The ruling in the first case was directed to the validity of the provision whereby neither the party nor the committee is to be permitted to make former political affiliations the test of party regularity. There were general observations in the opinion as to the functions of parties and committees. They do not constitute the decision. The decision was merely this, that "the committee whether viewed as an agency of the State or as a mere agency of the party is not authorized to take any action which is forbidden by an express and valid statute." The ruling in the second case, which does not come from the highest court of the State, upholds the constitutionality of section 3107 as amended in 1927, and speaks of the exercise of the inherent powers of the party by the act of its proper officers. There is nothing to show, however, that the mind of the court was directed to the point that the members of a committee would not have been the proper officers to exercise the inherent powers of the party if the statute had not attempted to clothe them with that quality. The management of the affairs of a group already associated together as members of a party is obviously a very different function from that of determining who the members of the group shall be. If another view were to be accepted, a committee might rule out of the party a faction distasteful to itself, and exclude the very men who had helped to bring it into existence. In any event, the Supreme Court of Texas has not yet spoken on the subject with clearness or finality, and nothing in its pronouncements brings us to the belief that in the absence of a statute or other express grant it would recognize a mere committee as invested with all the powers of the party assembled in convention. Indeed its latest decision dealing with any aspect of the statute here in controversy, a decision handed down on April 21, 1932 (*Love* v. *Buckner*, Supreme Court of Texas), describes the statute as constituting "a grant of power" to the State Executive Committee to determine who shall participate in the primary elections.* What was questioned in that case was the validity of a pledge exacted from the voters that it was their *bona*

*"We are bound to give effect to a grant of power to the State Executive Committee of a party to determine who shall participate in the acts of the party otherwise than by voting in a primary, when the Legislature grants the power in language too plain to admit of controversy, and when the deter-

fide purpose to support the party nominees. The court in upholding the exaction found a basis for its ruling in another article of the Civil Statutes (Art. 3167), in an article of the Penal Code (Art. 340), and in the inherent power of the committee to adopt regulations reasonably designed to give effect to the obligation assumed by an elector in the very act of voting. To clinch the argument the court then added that if all these sources of authority were inadequate, the legislature had made in Article 3107 an express "grant of power" to determine qualifications generally. There is no suggestion in the opinion that the inherent power of the committee was broad enough (apart from legislation) to permit it to prescribe the extent of party membership, to say to a group of voters, ready as was the petitioner to take the statutory pledge, that one class should be eligible and another not. On the contrary, the whole opinion is instinct with the concession that pretensions so extraordinary must find their warrant in a statute. The most that can be said for the respondents is that the inherent powers of the Committee are still unsettled in the local courts. Nothing in the state of the decisions requires us to hold that they have been settled in a manner that would be subversive of the fundamental postulates of party organization. The suggestion is offered that in default of inherent power or of statutory grant the committee may have been armed with the requisite authority by vote of the convention. Neither at our bar nor on the trial was the case presented on that theory. At every stage of the case the assumption has been made that authority, if there was any, was either the product of the statute or was inherent in the committee under the law of its creation.

We discover no significance, and surely no significance favorable to the respondents, in earlier acts of legislation whereby the power to prescribe additional qualifications was conferred on local committees in the several counties of the State. L. 1903, c. 101, sec. 94. The very fact that such legislation was thought necessary is a token that the committees were without inherent power. We do not impugn the competence of the legislature to designate the

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mination of the Committee conflicts with no other statutory requirement or prohibition, especially when the Committee's determination makes effectual the public policy of the State as revealed in its statutes." Love *v.* Buckner, *supra.*

agencies whereby the party faith shall be declared and the party discipline enforced. The pith of the matter is simply this, that when those agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the State itself, the repositories of official power. They are then the governmental instruments whereby parties are organized and regulated to the end that government itself may be established or continued. What they do in that relation, they must do in submission to the mandates of equality and liberty that bind officials everywhere. They are not acting in matters of merely private concern like the directors or agents of business corporations. They are acting in matters of high public interest, matters intimately connected with the capacity of government to exercise its functions unbrokenly and smoothly. Whether in given circumstances parties or their committees are agencies of government within the Fourteenth or the Fifteenth Amendment is a question which this court will determine for itself. It is not concluded upon such an inquiry by decisions rendered elsewhere. The test is not whether the members of the Executive Committee are the representatives of the State in the strict sense in which an agent is the representative of his principal. The test is whether they are to be classified as representatives of the State to such an extent and in such a sense that the great restraints of the Constitution set limits to their action.

With the problem thus laid bare and its essentials exposed to view, the case is seen to be ruled by *Nixon* v. *Herndon, supra.* Delegates of the State's power have discharged their official functions in such a way as to discriminate invidiously between white citizens and black. *Ex parte Virginia, supra; Buchanan* v. *Warley,* 245 U. S. 60, 77. The Fourteenth Amendment, adopted as it was with special solicitude for the equal protection of members of the Negro race, lays a duty upon the court to level by its judgment these barriers of color.

The judgment below is reversed and the cause remanded for further proceedings in conformity with this opinion.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 265.—October Term, 1931.

L. A. Nixon, Petitioner, vs. James Condon and C. H. Kolle. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[May 2, 1932.]

Separate opinion of Mr. Justice McReynolds.

March 15, 1929, petitioner here brought suit for damages in the United States District Court, Western Division of Texas, against Condon and Kolle, theretofore judges in a Democratic primary election. He claims they wrongfully deprived him of rights guaranteed by the Fourteenth and Fifteenth Amendments, Federal Constitution, by denying him the privilege of voting therein. Upon motion the trial court dismissed the petition, holding that it failed to state a cause of action; the Circuit Court of Appeals sustained this ruling. The matter is here by certiorari.

The original petition, or declaration, alleges—

L. A. Nixon, a negro citizen of the United States and of Texas duly registered and qualified to vote in Precinct No. 9, El Paso County at the general election and a member of the Democratic party, was entitled to participate in the primary election held by that party July 28, 1928, for nominating candidates for State and other offices. He duly presented himself and sought to cast his ballot. Defendants, the judges, refused his request by reason of the following resolution theretofore adopted by the State Democratic Executive Committee—

> "Resolved: That all white Democrats who are qualified and under the Constitution and laws of Texas and who subscribe to the statutory pledge provided in Article 3110, Revised Civil Statutes of Texas, and none other, be allowed to participate in the primary elections to be held July 28, 1928,

and August 25, 1928, and further, that the Chairman and secretary of the State Democratic Executive Committee be directed to forward to each Democratic County Chairman in Texas a copy of this resolution for observance."

That, the quoted resolution "was adopted by the State Democratic Executive Committee of Texas under authority of the Act of the Legislature"—Chap. 67, approved June 7, 1927. Chapter 67 undertook to repeal former Article 3107,* Chap. 13, Rev. Civil Stat. 1925, which had been adopted in 1923, Ch. 32, Sec. 1 (Article 3093a) and in lieu thereof to enact the following:

"Article 3107 (Ch. 67 Acts 1927). Every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party; provided that no person shall ever be denied the right to participate in a primary in this State because of former political views or affiliations or because of membership or non-membership in organizations other than the political party."

That, in 1923, prior to enactment of Chap. 67, the Legislature adopted Article 3093a,† Revised Civil Statutes, declaring that no negro should be eligible to participate in a Democratic party primary election. This was held invalid state action by *Nixon* v. *Herndon*, 273 U. S. 536.

That, when Chap. 67 was adopted only the Democratic party held primary elections in Texas and the legislative purpose was

†Article 3093a from Acts 1923. "All qualified voters under the laws and constitution of the State of Texas who are bona fide members of the Democratic party, shall be eligible to participate in any Democratic party primary election, provided such voter complies with all laws and rules governing party primary elections; however, in no event shall a negro be eligible to participate in a Democratic party primary election held in the State of Texas, and should a negro vote in a Democratic primary election, such ballot shall be void and election officials are herein directed to throw out such ballot and not count the same."

*Original Art. 3107—Rev. Civ. Stats. 1925: "In no event shall a negro be eligible to participate in a Democratic party primary election held in the State of Texas, and should a negro vote in a Democratic primary election, such ballot shall be void and election officials are herein directed to throw out such ballot and not count the same."

thereby to prevent Nixon and other negroes from participating in such primaries.

That, Chap. 67 and the above quoted resolution of the Executive Committee are inoperative, null and void in so far as they exclude negroes from primaries. They conflict with the Fourteenth and Fifteenth Amendments to the Federal Constitution and laws of the United States.

That, there are many thousand negro Democratic voters in Texas. The State is normally overwhelmingly Democratic and nomination by the primaries of that party is equivalent to an election. Practically there is no contest for State offices except amongst candidates for such nominations.

That, the defendants' action in denying petitioner the right to vote was unlawful, deprived him of valuable political rights, and damaged him five thousand dollars. And for this sum he asks judgment.

The trial court declared—

"The Court here holds that the State Democratic Executive Committee of the State of Texas, at time of the passage of the resolution here complained of, was not a body corporate to which the Legislature of the State of Texas could delegate authority to legislate, and that the members of said Committee were not officials of the State of Texas, holding position as officers of the State of Texas, under oath, or drawing compensation from the State, and not acting as a State governmental agency, within the meaning of the law, but only as private individuals holding such position as members of said State Executive Committee by virtue of action taken upon the part of members of their respective political party; and this is also true as to defendants, they acting only as representatives of such political party, viz: the Democratic party, in connection with the holding of a Democratic primary election for the nomination of candidates on the ticket of the Democratic party to be voted on at the general election, and in refusing to permit plaintiff to vote at such Democratic primary election defendants were not acting for the State of Texas, or as a governmental agency of said State."

Also, "that the members of a voluntary association, such as a political organization, members of the Democratic party in Texas, possess inherent power to prescribe qualifications regulating mem-

bership of such organizations, or political party. That this is, and was, true without reference to the passage by the Legislature of the State of Texas of said Art. 3107, and is not affected by the passage of said act, and such inherent power remains and exists just as if said act had never been passed."

The Circuit Court of Appeals said—

"The distinction between appellant's cases, the one under the 1923 statute and the other under the 1927 statute, is that he was denied permission to vote in the former by State statute, and in the latter by resolution of the State Democratic Executive Committee. It is argued on behalf of appellant that this is a distinction without a difference, and that the State through its legislature attempted by the 1927 act to do indirectly what the Supreme Court had held it was powerless to accomplish directly by the 1923 act.

"We are of opinion, however, that there is a vast difference between the two statutes. The Fourteenth Amendment is expressly directed against prohibitions and restraints imposed by the States, and the Fifteenth protects the right to vote against denial or abridgment by any State or by the United States; neither operates against private individuals or voluntary associations. *United States* v. *Cruikshank,* 92 U. S. 542; *Virginia* v. *Rives,* 100 U. S. 313; *James* v. *Bowman,* 190 U. S. 127.

"A political party is a voluntary association, and as such has the inherent power to prescribe the qualifications of its members. The act of 1927 was not needed to confer such power; it merely recognized a power that already existed. *Waples* v. *Marrast,* 108 Tex. 5; *White* v. *Lubbock,* 30 (Tex.) S. W. 722; *Grigsby* v. *Harris,* 27 F. (2d) 942. It did not attempt as did the 1923 act to exclude any voter from membership in any political party. Precinct judges of election are appointed by party executive committees and are paid for their services out of funds that are raised by assessments upon candidates. Revised Civil Statutes of Texas, Secs. 3104, 3108."

I think the judgment below is right and should be affirmed.

The argument for reversal is this—

The statute—Chap. 67, present Article 3107—declares that every political party through its State Executive Committee "shall have the power to prescribe the qualifications of its own members and

shall in its own way determine who shall be qualified to vote or otherwise participate in such political party." The result, it is said, is to constitute the Executive Committee an instrumentality of the State with power to take action, legislative in nature, concerning membership in the party. Accordingly, the attempt of the Democratic Committee to restrict voting in primaries to white people amounted to State action to that effect within the intendment of the Federal Constitution and was void under *Nixon* v. *Herndon, supra.*

This reasoning rests upon an erroneous view of the meaning and effect of the statute.

In *Nixon* v. *Herndon* the Legislature in terms forbade all negroes from participating in Democratic primaries. The exclusion was the direct result of the statute and this was declared invalid because in conflict with the Fourteenth Amendment.

The act now challenged withholds nothing from any negro; it makes no discrimination. It recognizes power in every political party, acting through its Executive Committee, to prescribe qualifications for membership, provided only that none shall be excluded on account of former political views or affiliations, or membership or non-membership in any non-political organization. The difference between the two pronouncements is not difficult to discover.

Nixon's present complaint rests upon the asserted invalidity of the resolution of the Executive Committee and, in order to prevail, he must demonstrate that it amounted to direct action by the State.

The plaintiff's petition does not attempt to show what powers the Democratic party had entrusted to its State Executive Committee. It says nothing of the duties of the Committee as a party organ; no allegation denies that under approved rules and resolutions, it may determine and announce qualifications for party membership. We cannot lightly suppose that it undertook to act without authority from the party. Ordinarily, between conventions party executive committees have general authority to speak and act in respect of party matters. There is no allegation that the questioned resolution failed to express the party will. For present purposes the Committee's resolution must be accepted as the voice of the party.

Petitioner insists that the Committee's resolution was authorized by the State; the statute only recognizes party action and he may not now deny that the party had spoken. The exclusion resulted from party action and on that footing the cause must be dealt with. Petitioner has planted himself there. Whether the cause would be more substantial if differently stated, we need not inquire.

As early as 1895—Ch. 35, Acts 1895—the Texas Legislature undertook through penal statutes to prevent illegal voting in political primaries, also false returns, bribery, etc. And later, many, if not all, of the general safeguards designed to secure orderly conduct of regular elections were extended to party primaries.

By Acts of 1903 and 1905, and subsequent amendments, the Legislature directed that only official ballots should be used in all general elections. These are prepared, printed and distributed by public officials at public expense.

With adoption of the official ballot it became necessary to prescribe the methods for designating the candidates whose names might appear on such ballot. Three, or more, have been authorized. A party whose last candidate for governor received 100,000 votes must select its candidate through a primary election. Where a party candidate has received less than 100,000, and more than 10,000, votes it may designate candidates through convention or primary, as its Executive Committee may determine. A written petition by a specified number of voters may be used in behalf of an independent or nonpartisan candidate.

Some of the States have undertaken to convert the direct primary into a legally regulated election. In others, Texas included, the primary is conducted largely under party rules. Expenses are borne by the party; they are met chiefly from funds obtained by assessments upon candidates. A number of States (eleven perhaps) leave the determination of one's right to participate in a primary to the party, with or without certain minimum requirements stated by statute. In "Texas the party is free to impose and enforce the qualifications it sees fit," subject to some definite restrictions. See Primary Elections, Merriam and Overacker, pp. 66, 72, 73.

A "primary election" within the meaning of the chapter of the Texas Rev. Civil Stat. relating to nominations "means an election held by the members of an organized political party for the purpose of nominating the candidates of such party to be voted for at a general or special election, or to nominate the county executive officers of a party." Article 3100; General Laws 1905, (1st C. S.) Ch. 11, Sec. 102. The statutes of the State do not and never have undertaken to define *membership*—who shall be regarded as a *member*—in a political party. They have said that *membership* shall not be denied to certain specified persons; otherwise, the matter has been left with the party organization.

Since 1903 (Acts 1903, Ch. CI., Sec. 94,* p. 150, 28th Leg.; Acts 1905, Ch. 11, Sec. 103, p. 543, 29th Leg.) the statutes of Texas have recognized the power of party executive committees to define the qualifications for membership. The Act of 1923, Ch. 32, Sec. 1, (Art. 3093a) and the Act of 1927, Ch. 67, Sec. 1, (Art. 3107) recognize the authority of the party through the Executive Committee, or otherwise, to specify such qualifications throughout the State. See *Love* v. *Wilcox,* 28 S. W. Rep. (2d) 515, 523.

These Acts, and amendments, also recognize the right of State and County Executive Committees generally to speak and act for the party concerning primaries. These committees appoint the necessary officials, provide supplies, canvass the votes, collect assessments, certify the successful candidates, pay expenses and do whatever is required for the orderly conduct of the primaries. Their members are not State officials; they are chosen by those who compose the party; they receive nothing from the State.

By the amendment of 1923 the Legislature undertook to declare that "all qualified voters under the laws and constitution of the State of Texas who are bona fide members of the Democratic party, shall be eligible to participate in any Democratic party primary election, provided such voter complies with all laws and rules governing party primary elections; however, in no event shall a negro be eligible to participate in a Democratic party primary election held in the State of Texas." *Love* v. *Wilcox, supra,* p. 523.

*Acts 1903, Ch. CI. "Sec. 94. . . . provided, that the county executive committee of the party holding any primary election may prescribe additional qualifications necessary to participate therein."

This enactment, held inoperative by *Nixon* v. *Herndon, supra,* (1927) was promptly repealed.

The courts of Texas have spoken concerning the nature of political primary elections and their relationship to the State. And as our present concern is with parties and legislation of that State, we turn to them for enlightenment rather than to general observations by popular writers on public affairs.

In *Waples* v. *Marrast,* 108 Texas 5, 11, 12, decided in 1916, the Supreme Court declared—

"A political party is nothing more or less than a body of men associated for the purpose of furnishing and maintaining the prevalence of certain political principles or beliefs in the public policies of the government. As rivals for popular favor they strive at the general elections for the control of the agencies of the government as the means of providing a course for the government in accord with their political principles and the administration of those agencies by their own adherents. According to the soundness of their principles and the wisdom of their policies they serve a great purpose in the life of a government. But the fact remains that the objects of political organizations are intimate to those who compose them. They do not concern the general public. They directly interest, both in their conduct and in their success, only so much of the public as are comprised in their membership, and then only as members of the particular organization. They perform no governmental function. They constitute no governmental agency. The purpose of their primary elections is merely to enable them to furnish their nominees as candidates for the popular suffrage. In the interest of fair methods and a fair expression by their members of their preference in the selection of their nominees, the State may regulate such elections by proper laws, as it has done in our general primary law, and as it was competent for the Legislature to do by a proper act of the character of the one here under review. But the payment of the expenses of purely party elections is a different matter. On principle, such expenses can not be differentiated from any other character of expense incurred in carrying out a party object, since the attainment of a party purpose—the election of its nominees at the general elections through the unified vote of the party membership, is necessarily the prime object of a party primary. . . .

"To provide nominees of political parties for the people to vote upon in the general elections, is not the business of the State. It is not the business of the State because in the conduct of the government the State knows no parties and can know none. If it is not the business of the State to see that such nominations are made, as it clearly is not, the public revenues can not be employed in that connection. To furnish their nominees as claimants for the popular favor in the general elections is a matter which concerns alone those parties that desire to make such nominations. It is alone their concern because they alone are interested in the success of their nominees. The State, as a government, can not afford to concern itself in the success of the nominees of any political party, or in the elective offices of the people being filled only by those who are the nominees of some political party. Political parties are political instrumentalities. They are in no sense governmental instrumentalities. The responsible duties of the State to all the people are to be performed and its high objects effected without reference to parties, and they have no part or place in the exercise by the State of its great province in governing the people."

Koy v. *Schneider*, 110 Texas, 369, 376 (April 21, 1920)—"The Act of the Legislature deals only with suffrage within the party primary or convention, which is but an instrumentality of a group of individuals for the accomplishment of party ends." And see *id.* pp. 394 *et seq.*

Cunningham v. *McDermett*, 277 S. W. Rep. 218, (Court of Civil Appeals, Oct. 22, 1925)—"Appellant contends that the Legislature by prescribing how party primaries must be conducted, turned the party into a governmental agency, and that a candidate of a primary, being the candidate of the governmental agency, should be protected from the machinations of evilly disposed persons.

"With this proposition we cannot agree, but consider them as they were held to be by our Supreme Court in the case of *Waples* v. *Marrast*, 108 Tex. 5, 184 S. W. 180, L. R. A. 1917A, 253, in which Chief Justice Phillips said: 'Political parties are political instrumentalities. They are in no sense governmental instrumentalities.'"

Briscoe v. *Boyle*, 286 S. W. 275, 276 (Court Civil Appeals, July 2, 1926)—This case was decided by an inferior court while the

Act of 1923, Ch. 32, Sec. 1, amending Art. 3093, was thought to be in force—before *Nixon* v. *Herndon, supra,* ruled otherwise. It must be read with that fact in mind. Among other things, the Court said—"In fine, the Legislature has in minute detail laid out the process by which political parties shall operate the statute-made machinery for making party nominations, and has so hedged this machinery with statutory regulations and restrictions as to deprive the parties and their managers of all discretion in the manipulation of that machinery."

Love v. *Wilcox, supra,* 522 (Sup. Ct., May 17, 1930)—"We are not called upon to determine whether a political party has power, beyond statutory control, to prescribe what persons shall participate as voters or candidates in its conventions or primaries. We have no such state of facts before us. The respondents claim that the State Committee has this power by virtue of its general authority to manage the affairs of the party. The statute, article 3107, Complete Tex. St. 1928 (Vernon's Ann. Civ. St. art. 3107), recognizes this general authority of the State Committee, but places a limitation on the discretionary power which may be conferred on that committee by the party by declaring that, though the party through its State Executive Committee, shall have the power to prescribe the qualifications of its own members, and to determine who shall be qualified to vote and otherwise participate, yet the committee shall not exclude anyone from participation in the party primaries because of former political views or affiliations, or because of membership or non-membership in organizations other than the political party. The committee's discretionary power is further restricted by the statute directing that a single, uniform pledge be required of the primary participants. The effect of the statutes is to decline to give recognition to the lodgment of power in a State Executive Committee, to be exercised at its discretion. The statutes have recognized the right of the party to create an Executive Committee as an agency of the party, and have recognized the right of the party to confer upon that committee certain discretionary powers, but have declined to recognize the right to confer upon the committee the discretionary power to exclude from participation in the party's affairs any one because of former political views or affiliations, or because of refusal to take any other than the statutory pledge. It is obvious,

we think, that the party itself never intended to confer upon its Executive Committee any such discretionary power. The party when it selected its State Committee did so with full knowledge of the statutory limitations on that committee's authority, and must be held to have selected the committee with the intent that it would act within the powers conferred, and within the limitations declared by the statute. Hence, the committee, whether viewed as an agency of the state or as a mere agency of the party, is not authorized to take any action which is forbidden by an express and valid statute."

Thomas B. Love, Appellant v. *Buckner and Wakefield, Appellees,* Texas Supreme Court, April 21, 1932.

The Court of Civil Appeals certified to the Supreme Court for determination the question—"Whether the Democratic State Executive Committee had lawful authority to require otherwise lawfully qualified and eligible Democratic voters to take the pledge specified in the resolution adopted by the Committee at its meeting in March," 1932.

The resolution directed that no person should be permitted to participate in any precinct or county Democratic convention held for the purpose of selecting delegates to the State convention at which delegates to the National Democratic Convention are selected unless such person shall take a written pledge to support the nominees for President and Vice-President.

"The Court answers that the Executive Committee was authorized to require the voters to take the specified pledge."

It said—

"The Committee's power to require a pledge is contested on the ground that the Committee possesses no authority over the conventions of its party not granted by statute, and that the statutes of Texas do not grant, but negative, the Committee's power to exact such a pledge.

"We do not think it consistent with the history and usages of parties in this State nor with the course of our legislation to regard the respective parties or the state executive committees as denied all power over the party membership, conventions, and primaries save where such power may be found to have been expressly delegated by statute. On the contrary, the statutes recognize party

organizations including the state committees, as the repositories of party power, which the Legislature has sought to control or regulate only so far as was deemed necessary for important governmental ends, such as purity of the ballot and integrity in the ascertainment and fulfillment of the party will as declared by its membership.

"Without either statutory sanction or prohibition, the party must have the right to adopt reasonable regulations for the enforcement of such obligations to the party from its members as necessarily arise from the nature and purpose of party government. . . .

"We are forced to conclude that it would not be beyond the power of the party through a customary agency such as its state executive committee to adopt regulations designed merely to enforce an obligation arising from the very act of a voter in participating in party control and party action, though the statutes were silent on the subject. . . .

"The decision in *Love* v. *Wilcox*, 119 Tex. 256, gave effect to the legislative intent by vacating action of the State Committee violative of express and valid statutes. Our answer to the certified question likewise gives effect to the legislative intent in upholding action of the State Committee in entire accord with the governing statutes as well as with party custom."

The reasoning advanced by the court to support its conclusion indicates some inadvertence or possibly confusion. The difference between statutes which recognize and those which confer power is not always remarked, *e. g.*, "With regard to the state committee's power to exact this pledge the statutes are by no means silent. The statutes do not deny the power but plainly recognize and confer same." But the decision itself is a clear affirmation of the general powers of the State Executive Committee under party custom to speak for the party and especially to prescribe the prerequisites for membership and for "voters of said political party" in the absence of statutory inhibition. The point actually ruled is inconsistent with the notion that the Executive Committee does not speak for the organization; also inconsistent with the view that the Committee's powers derive from State statutes.

If statutory recognition of the authority of a political party through its Executive Committee to determine who shall participate therein gives to the resolves of such party or committee the character and effect of action by the State, of course the same rule must apply when party conventions are so treated; and it would be difficult logically to deny like effect to the rules and by-laws of social or business clubs, corporations, and religious associations, etc., organized under charters or general enactments. The State acts through duly qualified officers and not through the representatives of mere voluntary associations.

Such authority as the State of Texas has to legislate concerning party primaries is derived in part from her duty to secure order, prevent fraud, etc., and in part from obligation to prescribe appropriate methods for selecting candidates whose names shall appear upon the official ballots used at regular elections.

Political parties are fruits of voluntary action. Where there is no unlawful purpose, citizens may create them at will and limit their membership as seems wise. The State may not interfere. White men may organize; blacks may do likewise. A woman's party may exclude males. This much is essential to free government.

If any political party as such desires to avail itself of the privilege of designating candidates whose names shall be placed on official ballots by the State it must yield to reasonable conditions precedent laid down by the statutes. But its general powers are not derived from the State and proper restrictions or recognition of powers cannot become grants.

It must be inferred from the provisions in her statutes and from the opinions of her courts that the State of Texas has intended to leave political parties free to determine who shall be admitted to membership and privileges, provided that none shall be excluded for reasons which are definitely stated and that the prescribed rules in respect of primaries shall be observed in order to secure official recognition of nominees therein for entry upon the ballots intended for use at general elections.

By the enactment now questioned the Legislature refrained from interference with the essential liberty of party associations and recognized their general power to define membership therein.

The words of the statute disclose such purpose and the circum-

stances attending its passage add emphasis. The act of 1923 had *forbidden* negroes to participate in Democratic primaries: *Nixon* v. *Herndon* (March, 1927) *supra;* held the inhibition invalid. Shortly thereafter (June, 1927) the Legislature repealed it and adopted the Article now numbered 3107 (Rev. Stats. 1928) and here under consideration. The fair conclusion is, that accepting our ruling as conclusive the lawmakers intended expressly to rescind action adjudged beyond their powers and then clearly to announce recognition of the general right of political parties to prescribe qualifications for membership. The contrary view disregards the words, that "every political *party* . . . shall in its own way determine who shall be qualified to vote or otherwise participate in such political party"; and really imputes to the Legislature an attempt indirectly to circumvent the judgment of this Court. We should repel this gratuitous imputation; it is vindicated by no significant fact.

The notion that the statute converts the Executive Committee into an agency of the State also lacks support. The language employed clearly imports that the political party, not the State, may act through the Committee. As shown above since the Act of 1903 the Texas laws have recognized the authority of Executive Committees to announce the party will touching membership.

And if to the considerations already stated there be added the rule announced over and over again that when possible statutes must be so construed as to avoid unconstitutionality, there can remain no substantial reason for upsetting the Legislature's laudable effort to retreat from an untenable position by repealing the earlier act, and then declare the existence of party control over membership therein to the end that there might be orderly conduct of party affairs including primary elections.

The resolution of the Executive Committee was the voice of the party and took from appellant no right guaranteed by the Federal Constitution or laws. It was incumbent upon the judges of the primary to obey valid orders from the Executive Committee. They inflicted no wrong upon Nixon.

A judgment of affirmance should be entered.

I am authorized to say that Mr. Justice VAN DEVANTER, Mr. Justice SUTHERLAND and Mr. Justice BUTLER concur in this opinion.